Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Robert R. Raymond, individually and doing business as Morningstar Consultants, and Robert G. Bernhoft, individually and doing business as Morningstar Consultants,

Petitioners,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether Internal Revenue Code suit authorization requirements are procedural, as the Seventh Circuit opined, or rather jurisdictional, as all other federal courts have held on this singularly important question of subject matter jurisdiction.

II. Whether summary judgment may be granted in an equity suit for injunctive relief, where defendants ceased the complained of conduct well before suit was brought, and tendered unrebutted sworn declarations that they had reputations in their respective communities for truthfulness, and would not engage in the offending conduct in the future.

III. Whether a permanent injunction prohibiting defendants from engaging in mere political advocacy constitutes a prior restraint prohibited by First Amendment Free Speech and Press guarantees.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to this proceeding, and neither of the Petitioners filing the instant Petition for Writ of Certiorari is a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 228 F.3d 804 (7th Cir. 2000). A copy of the Opinion is included in the Appendix to this Petition for Writ of Certiorari, Appendix A at 1-23.[1]

The orders of the United States District Court for the Eastern District of Wisconsin adopting the U.S. Magistrate's Recommendation and entering judgment, and the Magistrate's Recommendation adopted by the district court, are all published at 78 F. Supp.2d 856 (E.D. Wis. 1999) and are included in Appendix B at 24-25, Appendix C at 26-28, and Appendix D at 29-91, respectively.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit both issued its Opinion and entered its affirming judgment on September 26, 2000. The instant Petitioners filed a timely Petition for Rehearing *En Banc* which the Seventh Circuit denied on December 6, 2000. (Appendix F at 99-100.) This Petition for Writ of Certiorari is timely filed within 90 days of the Seventh Circuit's denial of the Petition for Rehearing, and this Court's jurisdiction is properly invoked under 28 U.S.C. §§ 1254(1) and 2106.

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1 Citations to "Appendix" are to Petitioners' Separate Appendix filed separately but in conjunction with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14.1(i)(vi).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I
"Right to Free Speech and Press"

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

* * * * *

26 U.S.C. § 6700
Promoting Abusive Tax Shelters, etc.[2]

* * * * *

26 U.S.C. § 6701
Penalties for Aiding and Abetting Understatement of Tax Liabilities

* * * * *

26 U.S.C. 7402
Jurisdiction of District Courts

* * * * *

26 U.S.C. § 7408
Action to Enjoin Promoters of Abusive Tax Shelters, etc.

* * * * *

26 U.S.C. § 7701
Definitions

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[2] Due to their individual and aggregate length, the six Internal Revenue Code sections cited here are set out in full text in Petitioners' Separate Appendix at Appendices G-K, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Internal Revenue Service ("IRS") Agent Jeffrey Palmer ("Palmer") began political surveillance of the U.S. Taxpayers Party and various party officials, including the National Vice-Chairman and Wisconsin State Chairman, as early as 1995. (R. at 322, Bernhoft's Third Decl., App. 60, ¶ 16; R. at 340, Raymond's Sixth Decl., App. 77, ¶ 8).[3] Palmer was compiling information on the Constitution Party platform, its conventions, and other activities. *See id.* The Constitution Party is nationally known for its outspoken criticism of the IRS. Petitioners Robert R. Raymond and Bernhoft G. Bernhoft are prominent, highly visible members of the Constitution Party.[4] (R. at 326, Raymond's Fourth Decl., App. 67, ¶ 14; R. at 322, Bernhoft's Third Decl., App. 60, ¶ 14.) Both men are state and national committeemen. *See id.* Raymond is also a two-time Constitution Party Senatorial candidate, while Bernhoft is the Constitution Party National Parliamentar-

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[3] Petitioners cite to the record below pursuant to Supreme Court Rule 12.7. Citations to the Petitioners' and the Government's various appendices filed with the United States Court of Appeals for the Seventh Circuit are:

(Br.App. x), Appellants' Required Appendix bound with their opening brief;

(App. x), Appellants' Separate Appendix filed in conjunction with their opening brief;

(SA x), the Government's Supplemental Appendix filed in support of its Appellee's Brief

(S.App. x), Appellants' Supplemental Appendix filed in support of their reply brief;

[4] The U.S. Taxpayers Party changed its name to the Constitution Party at its national convention in 1996. The Constitution Party is one of six parties recognized as national political parties by the Federal Election Commission.

ian and also serves on the Party's Executive Committee. *See id.*

During a six-month period between Fall 1995 and Spring 1996, Raymond and Bernhoft sold 32 copies of a collection of information known as the "De-Taxing America Program" to 32 members and supporters of the Constitution Party. *See id.* The looseleaf information was bound in (3) three-ring binders, and contained political polemic, theological exegesis, historical essays, state and federal case law, statutes, regulations, Internal Revenue Manuals, tax forms, and various form letters requesting information from government agencies. Revenue Agent Palmer became aware of this activity, and commenced a civil investigation as early as September of 1995. (R. at 327, Raymond's Fifth Decl., Exhibits A-L attached thereto.)

Palmer subsequently met with IRS Treasury Inspectors on December 19, 1995, and discussed an ongoing criminal investigation of Raymond and Bernhoft for their sale of the information binders. (R. at 327, Raymond's Fifth Decl., Ex. C attached thereto; R. at 291, Decl. of Treasury Inspector Jarosz.) On April 25, 1996, Treasury Inspector Jarosz approached the Criminal Section Chief in the United States Attorney's office, Francis D. Schmitz ("Schmitz"), and discussed the filing of IRS recommended criminal charges against Raymond, Bernhoft, and Morningstar Consultants for mail and wire fraud related to their sale of the controversial information binders. (R. at 327, Raymond's Fifth Decl., Ex. C attached thereto.) Schmitz declined to pursue criminal charges at this meeting based on his belief that there was no substantial harm to the Government, and that Raymond's and Bernhoft's known activity constituted First Amendment protected speech. *See id.*; R. at 289, Schmitz Decl., p. 2, ¶ 6.)

Sometime in Spring of 1996, Raymond and Bernhoft stopped selling the information binders, at a time when they were not aware that the IRS was investigating them both civilly and criminally. (R. at 322, Bernhoft's Third Decl, App. 60, ¶ 14; R. at 326, Raymond's Fourth Decl., App. 67, ¶ 6.) Later that same year, on November 15, 1996, Jarosz informed IRS Assistant District Counsel Langer ("Langer") and Revenue Agent Palmer that her criminal investigation of Morningstar Consultants, Raymond, and Bernhoft was closed. (R. at 291, Jarosz Decl., p. 3, ¶ 8.) On that same day, Palmer wrote Raymond and Bernhoft and advised them that his preliminary investigation of the "De-Taxing America Program" was complete. (R. at 259, Palmer's Third Decl., SA 155, ¶ 42.)

On May 12, 1997, Palmer swore out a declaration asserting he did not begin his investigation of Raymond and Bernhoft for selling the "De-Taxing America Program" until on or about June 24, 1996, over six months after Palmer's first meeting with Jarosz regarding a criminal investigation of Morningstar Consultants, Raymond, and Bernhoft, and over four months after his second meeting with Jarosz regarding that same criminal investigation. (R. at 21, Palmer's First Decl., SA 50, ¶ 5.) Palmer would also later testify that he never personally discussed a criminal investigation or the bringing of criminal charges against Morningstar Consultants, Raymond, or Bernhoft with any IRS employee. (R. at 327, Palmer Depo. of 10/17/97, Ex. K under Raymond's Fifth Decl.)

On February 25, 1997, Palmer issued "penalty assessments" of $32,000 each against Raymond and Bernhoft for allegedly engaging in conduct subject to penalty under 26 U.S.C. §§ 6700 and 6701. (R. at 21, Palmer's First Decl., SA 54, ¶ 20.) According to Palmer, these penalties issued because Raymond and Bernhoft sold thirty-two information binders for $34,578. *See id.* On November 13, 1996, IRS Assistant District Counsel Langer informed Treasury Inspector Jarosz that in lieu of

a criminal action against Raymond and Bernhoft, civil penalties and an injunction were being pursued through the Department of Justice. (R. At 327, Ex. C under Raymond Fifth's Decl.) Neither Palmer, Langer, nor any other IRS employee informed U.S. Department of Justice trial attorneys that AUSA Schmitz declined prosecution because of First Amendment concerns and his determination, upon reviewing the IRS's investigative information and recommendation for prosecution, that the Government had not been substantially harmed by Raymond's and Bernhoft's sale of information binders. (R. at 334, Tr. of Or. Arg., pp. 10-11.)

On March 3, 1997, the United States of America initiated an injunction action in the district court at the request of IRS attorney Langer, who directed the U.S. Attorney General bring a civil suit against Raymond and Bernhoft under 26 U.S.C. § 7408. (R. at 1, Pl.'s Compl., App. 7; R. at 20, Langer Decl., App. 19, ¶ 4.) The Government sought a Section 7408 injunction permanently restraining Raymond and Bernhoft from organizing or selling the "De-Taxing America Program", an allegedly abusive tax shelter within the meaning of 26 U.S.C. §§ 6700 and 6701, and from engaging in any conduct that substantially interferes with the enforcement of the internal revenue laws. (*See* R. at 1, Pl.'s Compl., App. at 7.)

The district court proceeded as if it had subject matter jurisdiction of a civil action arising under the laws of the United States pursuant to 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. §§ 7401, 7402(a), and 7408.[5] Of these, 26 U.S.C. § 7408 confers specific subject matter jurisdic-

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[5] Subject matter jurisdiction is set forth solely for the purposes of the instant Statement of the Case. Raymond and Bernhoft frequently objected to the district court's lack of subject matter jurisdiction, because the civil action below was not properly authorized according to the strict requirements of 26 U.S.C. § 7408(a).

tion on the district courts to entertain civil actions to enjoin any person from further engaging in conduct subject to penalty under 26 U.S.C. §§ 6700 and 6701. A Section 7408 action may be commenced in a district court of the United States, but only at the request of the Secretary of the Treasury or his delegate.

The Government moved for summary judgment on January 19, 1999. (R. at 251, Pl.'s Mot. for Summ. J.) Raymond and Bernhoft opposed the motion with declarations swearing they had not sold the information binders for over a year prior to the commencement of the injunction action – at a time when they had no knowledge of the IRS civil and criminal investigations proceeding against them – and would not sell the information in the future. (R. at 322, Bernhoft's Third Decl., App. 60, ¶¶ 4-9; R. at 326, Raymond's Fourth Decl., App. 67, ¶¶ 4-9.) Raymond and Bernhoft further declared that they had reputations in their respective communities for truthfulness. (R. at 322, Bernhoft's Third Decl., App. 60, ¶¶ 10-13; R. at 326, Raymond Fourth Decl., App. 67, ¶¶ 10-13.)

On June 17, 1999, Magistrate Callahan recommended summary judgment in favor of the Government, and that the proposed injunction should issue upon the district court's approval. (Appendix D at 29-91.) District Court Judge Charles N. Clevert, Jr. adopted the Magistrate's recommendation in its entirety on July 27, 1999, (Appendix B at 24-25), and subsequently denied Raymond's and Bernhoft's timely Rule 59 motion to alter or amend judgment on September 20, 1999. (Appendix E at 92-98.) Petitioners Raymond and Bernhoft filed a timely joint notice of appeal to the United States Court of Appeals for the Seventh Circuit on November 19, 1999. (R. at 368, Dfs.' Joint Notice of Appeal.) On September 26, 2000, the Court of Appeals affirmed the district court judgment. (Appendix A at 1-23.) Petitioners' request for rehearing *en banc* was denied on December 6, 2000. (Appendix F at 99-100.)

ARGUMENT FOR GRANTING WRIT

The Seventh Circuit Panel's determination that the suit authorization requirements of 26 U.S.C. § 7408 are procedural, rather than jurisdictional, directly conflicts with both its own controlling precedent and the authoritative decisions of every federal court that has considered the question. This naked holding below, wholly bereft of legal analysis and lacking any discussion of universally held contrary authority, makes a presumptuous mockery of unambiguous congressional intent – clearly expressed in the authorizing statute itself – that the Government must comply with certain jurisdictional procedures before federal court door's are open to it for injunction suits. If allowed to stand, a dangerous jurisdictional precedent that is contrary to established law and public policy threatens to infect other circuits that have not considered this question.

Moving cavalierly past this singularly important jurisdictional issue, the Panel approved a permanent injunction on summary judgment – again in spite of its own controlling precedent, the well-reasoned opinions of sister courts of appeal, and this Court's controlling decisions – all of which demanded on opposite result. For not only did the Petitioners cease the complained of activity well before the injunction suit was brought, raising an Article III mootness problem, they opposed summary judgment with unrebutted declarations swearing that they had reputations in their respective communities for truthfulness, and would not engage in the offending conduct in the future. These declarations raised credibility questions this Court has ruled are never properly resolved on summary judgment. Moreover, Raymond's and Bernhoft's sworn averments interposed material disputed facts that precluded summary judgment – the precise position taken by an authoritative decision of the Ninth Circuit on indistinguishable facts.

The Panel could not cite one case in support of its bizarre review methodology on these questions of credibility and material facts bearing on future intent: there simply was no federal authority contrary to Petitioners' uncontroversial position. Perhaps that is why, as with the jurisdictional issue, the Panel refused to discuss, much less mention, the amply briefed and vigorously argued decisions of this Court and other conforming appellate jurisdictions that universally direct the conclusion that summary judgment was inappropriate on facts such as these. Making matters worse, the Panel reviewed the summary judgment grant below under some sort of abuse of discretion balancing standard, as if the permanent injunction had been imposed on the Petitioners after a full trial, instead of on summary judgment. The Panel's unjustifiable legal treatment of these issues directly conflicts with this Court's summary judgment precedents, and has created a variety of inter-circuit conflicts that damage the very fabric of federal jurisprudence in this important area.

The Panel concluded its opinion by sanctioning an abusive permanent injunction over serious political speech concerns raised throughout the proceedings in the district court. It seems the Panel doubted this Court's commitment to its post-*Brandenburg* First Amendment jurisprudence and the protection extended to principled political dissenters who voice opposition to Government agencies they disagree with. And continuing a pattern of ignoring persuasive appellate authority contrary to what clearly was an outcome-driven decision, the Panel refused to discuss the persuasive reasoning of a Ninth Circuit case that correctly interpreted this Court's controlling First Amendment precedents and reversed the criminal convictions of several promoters of abusive trust schemes.

The Seventh Circuit Panel decision below cannot be allowed to stand in defiance of this Court's precedents and the persuasive holdings of numerous other federal courts of appeal. Significantly, such an unreviewed opinion

promises to vexatiously multiply litigation throughout the federal courts of appeal over what were once well-settled legal principles, and sets the law of the Seventh Circuit squarely against this Court's well-reasoned precedents and the conforming federal jurisprudence and common sense practiced and observed by all other federal courts of appeal.

I. Jurisdiction Argument

Internal Revenue Code Suit Authorization Requirements are Unquestionably Jurisdictional, and so Held by Every Federal Court that has Addressed the Matter, Except the Seventh Circuit Panel Below.

Contrary to the Panel's startling decision, Internal Revenue Code suit authorization requirements are jurisdictional. *See United States v. One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir. 1944). The entire body of federal authority on this subject derives from this definitive case. An authorization attempt that fails under the controlling Internal Revenue Code statute deprives a federal district court of subject matter jurisdiction: "[W]here the Congress prohibits the commencement of a civil action unless certain specific acts are performed, the court has no jurisdiction over the subject matter until requisite conditions are met in fact and such compliance is shown by the pleadings and, where necessary, established by proof." *United States v. One 1972 Cadillac*, 355 F. Supp. 513, 514 (E.D. Kent. 1973) (citing *United States v. One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir. 1944)).

This obvious jurisdictional conclusion is supported by the authoritative decisions of the Sixth, Eighth, and Ninth Circuits, and every other federal court that has addressed the issue. *See United States v. Twenty-Eight "Mighty Payloader" Coin Operated Gaming Devices*, 623 F.2d 510, 513 & n.2 (8th Cir. 1980) (citing *One 1941 Cadillac Sedan*, 145 F.2d at 299; *United States v. Twenty-Two Firearms*,

463 F. Supp. 730 (D.Co. 1979)); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) (citing *One 1972 Cadillac Sedan*, 355 F. Supp. at 513); *Palmer v. United States*, 116 F.3d 1309, 1311 (9th Cir. 1997).

Notwithstanding the uncontroverted line of federal authority derived from the Seventh Circuit's own controlling precedent, *see 1941 Cadillac Sedan, supra*, the Panel asserted, without any citation to authority or alternative legal reasoning, that:

> [T]he provision that the suit must be authorized by the Secretary of the Treasury or his delegate, [is] procedural and not jurisdictional. Therefore, even if we were to conclude that the United States had not received proper authorization from the Secretary of the Treasury, that fact would not affect the jurisdiction of the district court.

United States v. Raymond, et al., 228 F.3d 804, 809 (7th Cir. 2000).

The Panel made this naked assertion in spite of the fact that the previously uncontroverted line of cases referred to above were all amply briefed on appeal and fully discussed at oral argument on June 2, 2000. But the Panel refused to mention, much less discuss, these cases or its own controlling jurisdictional precedent, and failed to provide any intellectual support for a holding that purports to cavalierly overturn an axiomatic rule of federal subject matter jurisdiction – the necessity of strict compliance with statutory suit authorization requirements. *See One 1941 Cadillac Sedan*, 145 F.2d at 296.

The Panel was apparently concerned that its insupportable primary jurisdictional holding would not survive this Court's penetrating scrutiny. Apparently based on this well taken concern, the Panel attempted to bolster its decision with a series of "alternative" jurisdic-

tional holdings, unnecessarily offered in light of this Court's sound and time-honored policy of determining cases at the their most foundational level and eschewing discussion of all other matters if that first-level analysis disposes of the case – particularly in the area of subject matter jurisdiction. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

The Panel's exposition of unnecessary alternative jurisdictional underpinnings is telling. But although each of these "alternative" holdings fails under controlling authority, the Panel's attempt does fortuitously provide this Court a unique opportunity to state the burden shifting rules of challenges to suit authorization requirements in a coherent way not yet fully explicated by the federal courts of appeal. The appropriate rule derived from authoritative cases dealing with suit authorization challenges also provides the necessary basis for disposing of the Panel's suspect "alternative" holdings.

Once proper suit authorization is challenged, the Government carries the burden of proof and risk of non-persuasion on all elements of proper authorization, and if that burden is not met, the district court is deprived of subject matter jurisdiction:

> [T]he law is clear, and I so hold, that where allegations of authority to proceed and direction to commence the action are denied, the issues are put to proof and the conditions precedent shall not be presumed. There is too much danger that, in the absence of proof of compliance with the conditions precedent, I would be proceeding without jurisdiction.

Twenty-Two Firearms, 463 F. Supp. at 731 (citing *1941 Cadillac Sedan*, 145 F.2d at 296; *1972 Cadillac Sedan*, 355 F. Supp. at 514); *accord Twenty-Eight "Mighty Payloader" Gaming Devices*, 623 F.2d at 513 & n.2.

But in order to put the Government to its jurisdictional proof, proper authorization must either be denied in an answer or challenged in a motion to dismiss at the trial court level. *See 1941 Cadillac Sedan*, 145 F.2d at 296. Although objections to subject matter jurisdiction can never be waived, *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 896-97 (1991), a defendant who fails to make a timely district court authorization challenge and first raises this jurisdictional defense on appeal must produce contrary evidence to overcome the rebuttable presumption that the acts of the Attorney General or his delegate are regular if not first challenged in the district court: "[T]he United States attorney is a part of the Department of Justice. He must be presumed, in the absence of evidence to the contrary, to have acted within his authority." *1941 Cadillac Sedan*, 145 F.2d at 299.

With this controlling authority as its guide, it is no wonder the Panel went on to postulate a series of "alternative" jurisdictional suggestions because of an apparent lack of confidence in its primary jurisdictional holding. First, the Panel opined that a letter to the Assistant Attorney General for the Tax Division of the Department of Justice sent by Edward G. Langer ("Langer"), IRS Assistant District Counsel, constituted the effective authorization mandated by 26 U.S.C. § 7408, *see United States v. Raymond*, 228 F.3d at 809, the statute which created the Government's cause of action:

> A civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 relating to penalties for aiding and abetting understatement of tax liability) may be commenced at the request of the Secretary.

26 U.S.C. § 7408(a), Appendix J at 107.

Raymond and Bernhoft do not dispute the fact that Langer sent a letter to the Attorney General; rather, the question as it relates to subject matter jurisdiction is whether Langer was a proper delegate of the Secretary of the Treasury for the purpose of making Section 7408 authorization requests.[6] The Panel answered this question by looking to Langer's declaration submitted in opposition to one of Petitioners' motions to dismiss: "Langer submitted a declaration to the district court asserting that he was duly authorized by the Secretary of the Treasury to request that this action be commenced." *United States v. Raymond*, 228 F.3d at 809.

But Langer's declaration made no such assertion. Instead, Langer merely asserts that he was a "delegate of the Chief Counsel, a delegate of the Secretary of the Treasury of the United States of America." (R. At 20, Langer Decl., Sep.A. at 19, ¶ 4.) But a delegate for what purposes? Nowhere in his vague declaration does Langer assert that he is "duly authorized by the Secretary of the Treasury . . . by one or more redelegations of authority" to

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[6] Importantly for this discussion, the term "Secretary" means the Secretary of the Treasury or his delegate. *See* 26 U.S.C. § 7701(a)(11)(B). The phrase "or his delegate" means, when used with reference to the Secretary of the Treasury, "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." 26 U.S.C. § 7701(a)(12)(A)(i). Thus the question posed above can be rephrased more precisely: Was Langer "duly authorized by the Secretary directly, or indirectly by one or more redelegations of authority," to "perform the function" of making a Section 7408 request? 26 U.S.C. §§ 7701(a)(12)(A)(i) and 7408(a).

make Section 7408 authorization requests. 26 U.S.C. § 7701(a)(12)(A)(i).[7]

Furthermore, even if Langer had made the required "duly authorized to make Section 7408 authorization requests" averment, he must also point to the delegation orders that specifically delegated Section 7408 request authority to the IRS Assistant District Counsel level:

> If he [a public official] has the authority of law to sustain him in what he has done . . . he must show it to the court and abide the result . . . . It is no answer . . . to say I am an officer of the government and acted under its authority unless he shows the sufficiency of that authority.

Cunningham v. Macon & B.R. Co., 109 U.S. 456 (1883); *see also 1972 Cadillac Sedan*, 355 F. Supp. at 515 ("[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective.") (relying on *1941 Cadillac Sedan*, 145 F.2d 296).

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[7] At one point the Panel suggested that 26 U.S.C. § 7402(a) might provide the district court below with specific subject matter jurisdiction. *See United States v. Raymond*, 228 F.3d at 809. To the contrary, the action below was brought under 26 U.S.C. § 7408. In turn, Section 7408 requires that an alleged promoter of abusive tax shelters first be found to have engaged in conduct subject to penalty under either Sections 6700 or 6701 before the separate injunction criteria of Section 7408 can be evaluated and potentially applied.

The extensive analysis of both the Magistrate Judge and the Court of Appeals in manipulating these interrelated statutes to justify the injunction demonstrates beyond a shadow of a doubt that Section 7408 is the jurisdiction-conferring statute in this case. If not, Congress didn't really mean it when it said that the Secretary of the Treasury or his delegate must make an authorization request of the Attorney General prior to commencement of a Section 7408 action. This suggestion cannot be taken seriously.

And there is no question that Langer could not properly make a Section 7408 authorization request unless the Secretary of the Treasury had delegated such authority, directly or indirectly, down to the IRS Assistant District Counsel level, because such delegation orders are routinely examined by federal courts faced with challenges to the act(s) of an IRS employee. For example, even the acts of an IRS District Director are void absent expressly delegated authority to do a particular act:

> [T]he authority to settle disputes involving unpaid liability over $100,000 is granted only to IRS Regional Commissioners and Regional Counsel. **Delegation Order 11 (Rev. 13), 1982-1 Cum. Bull. 333**. Thus, even if the District Director had signed the letter and intended to accept Frank's offer of compromise, the acceptance would have been ineffective.

Brooks v. United States, 833 F.2d 1136, 1146 (4th Cir. 1987) (emphasis added); *see also Boulez v. C.I.R.*, 810 F.2d 209, 217-18 (D.C. Cir. 1987).

Moreover, these rules of delegation have universal application outside of Internal Revenue matters. In fact, all powers conferred by Congress on government officials who act in matters affecting private citizens must be made expressly redelegable by statue or regulation to subordinates, and failure to actually make such authorized redelegation voids any subsequent acts. *See Lopez-Telles v. I.N.S.*, 405 F.2d 147, 149-50 (1st Cir. 1969). Specific acts require specific delegation. *See id.* Delegated authority is essential for every act taken on behalf of the government, and only the officer who has been specifically delegated the requisite authority can do the act contemplated. *See United States v. Giordano*, 416 U.S. 505 (1974). In *Giordano*, the defendant challenged the validity of a wiretap application made by a subordinate to the Attorney General, when under existing law it could only be approved by the Attorney General and a specially

designated assistant. *See id.* This Court held the subordinate's act void, declared the wiretap illegal, and ordered the evidence suppressed.

On this authoritative basis, the Panel's analysis of Langer's declaration is clearly erroneous and fatally flawed, for it appears that Langer's declaration was artfully crafted to avoid making a direct statement that he was duly authorized to make Section 7408 authorizations, and this telling omission is jurisdictionally fatal: "[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective." *1972 Cadillac Sedan*, 355 F. Supp. at 515 (relying on *1941 Cadillac Sedan*, 145 F.2d 296).

Assuming, *arguendo*, that Langer's declaration explicitly stated he was duly authorized to make Section 7408 authorizations, and referred to delegation orders and/or other legal authority that conveyed this authority to him, the burden would have shifted to Raymond and Bernhoft to rebut the declaration's averments. Without discussing the applicable burden shifting rules, however, the Panel asserts, in an astonishing misapprehension of the record, that: "The appellants had ample opportunity to produce evidence that contradicts this [Langer's] declaration and have not done so." *United States v. Raymond*, 228 F.3d at 809.

Indisputably to the contrary, Raymond and Bernhoft introduced unrebutted evidence into the record that the IRS Chief Counsel never redelegated Section 7408 authorization authority to any of his inter-office subordinates – much less all the way down to Langer's assistant district counsel level. (R. at 353, Appeal from Magistrate's Order, pp. 5-6, S. App. 1; R. at 355, Raymond's Eighth Decl., ¶ 4 and Exhibit A attached thereto at p. 5, ¶ 5, S. App. 16, 18, 22; R. at 354, Bernhoft's Fifth Decl., ¶ 4, S. App. 14.) Here we have the explanation as to why the Government steadfastly refused to shoulder its burden of

proving up the jurisdictionally necessary fact of proper Section 7408 authorization.

The evidence Raymond and Bernhoft introduced consisted of an IRS National Office response to a Freedom of Information Act ("FOIA") request Raymond and Bernhoft filed in hopes of countering the district court's refusal to order the Government to produce Langer's delegation orders pursuant to a motion to compel discovery. (R. at 297, Defs.' Mot. To Compel Discovery.) The IRS National Office provided General Counsel Order No. 4 ("GCO #4") to Petitioners, which delegated civil action recommendation authority from the General Counsel, Department of the Treasury, to the Chief Counsel, Internal Revenue Service. (R. at 355, Raymond's Eighth Decl., Ex. A, p. 5, ¶ 5, S. App. 22.) No other delegation orders were provided in response to this request. Significantly in this last regard, the IRS Program Analyst who provided GCO #4 to Raymond and Bernhoft personally confirmed that the IRS Chief Counsel made no further redelegations of Section 7408 civil action recommendation authority. (R. at 354, Bernhoft's Fifth Decl., ¶ 4, S.App. 14.)

Not only was this competent and unrebutted evidence that Langer lacked Section 7408 authority entered several times into the district court record and argued in the briefs, (Appellants' Reply Brief, pp. 4-5.), GCO #4 and its jurisdictional implications were also discussed before the Panel at oral argument. In light of all this, the Panel's flat statement that this evidence did not exist, and the attendant assertion that Raymond and Bernhoft did not shoulder what burden they might have had to produce contrary evidence, is truly mystifying. All told, the Panel's unjustifiable legal treatment of this significant jurisdictional question and its misapprehension of clearly set forth relevant facts constitutes a radical departure from the usual course of federal appellate review. The need for this Court's judicial guidance is acute.

II. Summary Judgment

The Panel Applied an Incorrect Review Standard and Impermissibly Resolved Determinative Credibility Questions on Summary Judgment, in Direct Conflict with this Court's Precedents and the Conforming Decisions of Numerous Federal Courts of Appeal.

In order to prevail on its motion for summary judgment, the Government needed to establish that there were no material facts in dispute and that it was entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp., v. Catrett*, 477 U.S. 317, 322 (1986). Neither the district court nor the Court of Appeals Panel, however, employed this axiomatic summary judgment calculus. Instead, in direct conflict with this Court's summary judgment interpretive precedents, both courts below engaged in lengthy and impermissible abuse of discretion balancing analyses to justify imposition of the injunction. *See United States v. Raymond, et al.*, 78 F. Supp.2d 856, 882-884 (E.D. Wis. 1999), Appendix D at 85-89; *United States v. Raymond*, 228 F.3d at 813-815, Appendix A at 16-20. On this ground alone reversal and remand is required.

Furthermore, as previously explained, both Raymond and Bernhoft opposed summary judgment with sworn declarations asserting they had not sold the controversial information binders for about a year prior to the suit's commencement – at a time when they had no knowledge of the IRS' criminal and civil investigation against them – and that they would not sell them in the future. (R. at 322, Bernhoft's Third Decl., App. at 60, ¶¶ 4-14; R. at 326, Raymond's Fourth Decl., App. at 67, ¶¶ 4-14.) Yet in spite of these declarations, the Panel impermissibly weighed and balanced the evidence before them: "[W]e conclude that their [Raymond's and Bernhoft's] claims that they will not engage in unlawful activity in the future are

insufficient to overcome the other circumstances that indicate that there is a significant likelihood that the appellants will again incite others to violate the tax laws." (Appendix A at 19.)

According to this Court, however, such evidence weighing is not permitted on summary judgment, and furthermore, Raymond's and Bernhoft's sworn declarations raised a material issue of fact regarding Petitioners' credibility and future intent which precluded summary judgment:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment. The evidence of [Petitioners] is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996).[8]

The rule that questions of credibility and intent are inappropriately decided on summary judgment is universally accepted by all federal courts of appeal, but

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[8] By conducting the weighing and balancing analysis, the Panel decision also conflicts with several of its own Seventh Circuit precedents: "In summary judgment procedure the trial court should not weigh the evidence of the plaintiffs against that of the defendants. That is the function of the factfinder at trial." *Staren v. Am. Nat'l Bank and Trust Co.*, 529 F.2d 1257, 1261 (7th Cir. 1976). If the evidence is subject to different interpretations, summary judgment is not appropriate. *See Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993) (citing *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir.1993)).

the Fourth Circuit recently stated the rule in the clearest possible terms:

> Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence . . . . Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on [certain] issues . . . he should ordinarily hear the evidence and direct the verdict rather that attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh the evidence in advance of its being presented.

Magill v. Gulf & Western Industries, Inc., 736 F.2d 976, 979 (4th Cir. 1984). [9]

Raymond and Bernhoft also repeatedly pointed to a Ninth Circuit case for the proposition that their declarations raised material disputed facts which precluded summary judgment. *See Great Western Land & Dev., Inc. v. S.E.C.*, 355 F.2d 918 (9th Cir. 1966). The facts, issue, and holding of *Great Western* are perfectly analogous to

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9 *See also Poller v. C.B.S.*, 368 U.S. 473 (1962); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *County Floors, Inc. v. A Partnership of Gepner & Ford*, 930 f.2d 1056, 1062 (3rd Cir. 1991) ("Credibility determinations . . . are inappropriate to . . . a ruling on summary judgment"); *National Union Fire Ins. Co. Of Pittsburgh v. Turtur*, 892 F.2d 199, 205 (2nd Cir. 1989) ("Questions of intent . . . are usually inappropriate for disposition on summary judgment"); *Manley v. Plasti-Line, Inc.*, 808 F.2d 468,471 (6th Cir. 1987); *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 910 (6th Cir. 1982)

the case at bar. *See ed.* There, the Securities and Exchange Commission (the "SEC") sought to permanently enjoin two pro se defendants from selling allegedly unregistered securities. *See id.* at 918. Upon receiving the SEC's complaint that the sales in questions violated securities law, the defendants promptly stopped the challenged sales – in spite of their strongly asserted contention that their activities constituted no such violation. *See id.* at 919.

The *Great Western* defendants opposed summary judgment with affidavits declaring they would not sell the challenged securities in the future, even though they admitted no culpability for previous sales, but the district court granted summary judgment over defendants' sworn statements of future intent. *See id.* As the Ninth Circuit further explained on appeal:

> On summary judgment motion, one of the principal issues was whether it was likely that appellants would, unless restrained, continue in the future the offending conduct of the past. The District court when faced with affidavits of appellants stating that they would not violate the Act, found: "There is no assurance that the defendants . . . may not at some future date resume their unlawful activities."

Id.

On appeal at the Ninth Circuit, the Government urged the district court view that it "was under no compulsion to accept the self-serving assurances of appellants," but the court of appeals unhesitatingly reversed and remanded on grounds that appellants' affidavits of future intention raised a material fact, "the resolution of which was essential in order to justify the issuance of the injunction." *Id.* (citing *SEC v. First Guardian Sec. Corp.*, 95 F. Supp. 580 (S.D.N.Y. 1950)). According to the Ninth Circuit panel, the district court

impermissibly weighed the defendants' assurances that they would not violate the securities laws in the future against the Government's suspicion that they would. In the end, the district court refused to credit the defendants' sworn assurances. *See id.* On this score, the appeals court admonished that: "While disbelief of appellants may be a sufficient basis for the ultimate resolution of this issue . . . the [district] court acted too precipitately in fixing upon its disbelief at this state of the proceedings and on the basis of affidavits." *Id.*

Importantly, neither Raymond, Bernhoft, nor the Government could locate any federal authority which controverts the *Great Western* holding. In fact, subsequent cases on analogous facts rely on *Great Western's* thoughtful reasoning. *See, e.g., SEC v. Everest Management Corp.*, 466 F. Supp. 167, 172 (S.D. N.Y 1979) ("[W]here issues of fact remain concerning . . . the reasonable likelihood of future violations, injunctive relief will not be granted upon motion for summary judgment.") (citing *Great Western*, 355 F.2d at 918). Strikingly, the Panel made no mention of *Great Western* in its decision, presumably because it did not apply the axiomatic "material facts in dispute" summary judgment analysis.

Other courts of appeal have reached the same conclusion as the *Great Western* court on very similar facts. Raymond's and Bernhoft's exhaustive declarations that they would not engage in conduct subject to penalty in the future or otherwise incite others not to pay lawfully imposed federal taxes presented a credibility question, and "[t]he courts have long recognized that summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved." *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) (reversing district court grant of summary judgment and remanding for trial) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (other citations omitted). The *Koracorp* court went on to note that "[t]he

general rule proscribing summary judgment where credibility is in question is particularly pertinent here," because the *Koracorp* defendants asserted, as Raymond and Bernhoft have here, that they would never commit the complained of violations again. *Id.*

In this case, as in *Great Western and Koracorp*, whether an injunction is necessary and appropriate to prevent the recurrence of the conduct is a disputed fact "the resolution of which is essential in order to justify the issuance of the injunction." *Id.*; 26 U.S.C. § 7408(b)(2). Furthermore, this disputed fact is material because the evidence, when viewed in a light most favorable to Raymond and Bernhoft, would permit a reasonable factfinder to decide that an injunction was not necessary to prevent the recurrence of the conduct. *See Eiland v. Trinity Hospital*, 150 F.3d 747, 750, (7th Cir. 1998) (citing *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1290 (7th Cir. 1997)). In turn, the relevant factors in determining whether an injunction is necessary to prevent the recurrence of the conduct are:

> [T]he gravity of the harm caused by the offense; the extent of the defendant's participation and his degree of scienter; the isolated or recurrent nature of his infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations.

United States v. Kaun, 827 F.2d 1144, 1149 (7th Cir. 1987) (quoting *S.E.C. v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982)).

Raymond's and Bernhoft's sworn declarations not only stated they had stopped selling the information binders well before they became aware of the IRS investigation, and would not sell them in the future, but

also asserted that they had: (1) reputations in their communities for being truthful; (2) never relied on the binder sales for their living; and (3) other primary occupations that did not predispose them to future involvement with such activity. (R. at 322, Bernhoft's Third Decl., ¶¶ 7-14, App. 60; R. at 326, Raymond's Fourth Decl., ¶¶ 7-14, App. 67.)

Significantly, the Government never rebutted Raymond's and Bernhoft's declarations, and under the Seventh Circuit's own authority, Raymond's and Bernhoft's unrebutted declarations of future intent must be taken as true. *See Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 & n.10 (7th Cir. 1976). And construing Raymond's and Bernhoft's explicit declarations in the most favorable light to them and drawing all inferences therefrom in their favor, it is self-evident that a reasonable factfinder could have determined that the injunction was not necessary, because Raymond and Bernhoft would not engage in the offending conduct in the future. The Panel decision has made a horrible muddle of what were well-settled summary judgment principles in the Seventh Circuit, and cannot stand.

III. First Amendment

Raymond's and Bernhoft's Sale of Information Binders was at Most Mere Political Advocacy, Not Incitement to Imminent Lawless Action, and was Therefore First Amendment Protected Speech.

The Panel seems to have adopted the overruled First Amendment approach set out in *Whitney v. California*, 274 U.S. 357 (1927). In overturning that unsound decision and its intellectual antecedents, this Court observed that the *Whitney* majority had simply permitted the sanction of "ideas which the . . . Court deemed unsound and dangerous." *See Brandenburg v. Ohio*, 395 U.S. 444, 452 (1969) (Douglas, J. concurring). As the

Court further held: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See id.* In turn, speech directed to incite "imminent lawless action" is speech that can result in nothing other than violations of law.

But as the Panel decision concedes, only about half of the information purchasers took any action whatever after purchasing the information – lawful or otherwise. *USA v. Raymond*, 228 F.3d 807, Appendix A at 3. The other half did nothing except perhaps read the information – which Raymond and Bernhoft do no understand to be illegal. Moreover, the Panel incorrectly asserts that: "The Government presented the declarations of several Program customers who admitted failing to file income tax returns, filing request for refunds to which they were not entitled, and submitting numerous FOIA requests." *USA v. Raymond*, 228 F.3d at 813, Appendix A at 17. To the contrary, no such declarations were ever presented by the Government.[10] But even on these disputed facts, Raymond's and Bernhoft's speech did not produce much allegedly lawless action: how "imminent" and "likely" can that be under the *Brandenburg* rule? Examining the instant case in *Brandenburg's* light, Raymond's and

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10 The Panel also incorrectly asserts that: "Upon contacting Morningstar, callers were encouraged to purchase the De-Taxing America Program." *USA v. Raymond*, 228 F.3d 812, Appendix A at 13-14. This material misapprehension of the record appears out of whole cloth, because there is not one scintilla of evidence in the record to support it. In fact, the record shows that Raymond and Bernhoft never encouraged anyone to purchase the controversial information. (R. at 268, Dable Depo., 11:7-16.)

Bernhoft's sale of information binders was clearly protected speech.[11]

Not surprisingly, the Panel decision relied heavily on *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) for its First Amendment holding. Unlike Dennis Kaun, though, Raymond and Bernhoft did not tell people not to file the IRS Form 1040 or pay taxes, nor did they advocate bogging down the IRS with numerous FOIA requests, or advocate "serving federal judges with 45's." *See Kaun*, 827 F.2d at 1149; R. at 322, Bernhoft's Third Decl., ¶¶ 16-22, App. at 60; R. at 326, Raymond's Fourth Decl., ¶¶ 16-23, App. at 67. Even in *Kaun*, however, the Seventh Circuit seemed deeply troubled by the First Amendment implications of the injunction contemplated there, as evidenced by Judge Ripple's thoughtful concurrence: "I believe it would be a mistake for the government or for the district courts in this circuit to interpret this case as signaling any diminution in our scrutiny of government submissions aimed at curtailing first amendment rights." *Kaun*, 826 F.2d at 1154-55 (Ripple, J., concurring). It is therefore surprising that the Panel chose to largely overlook the injunction's serious First Amendment problems

Moreover, the Panel decision directly conflicts with *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983). There, defendants were charged criminally under 26 U.S.C. § 7206 for promoting a tax avoidance trust scheme, and were convicted in the district court below. *See id.* The appeals court, however, overturned their convictions on First Amendment grounds: "Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action. Not even national

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11 Worth noting in this regard is the fact that Assistant U.S. Attorney Francis Schmitz refused to prosecute Raymond and Bernhoft criminally based on his belief that Raymond's and Bernhoft's sale of information binders was First Amendment protected speech. (R. at 306, Dfs.' Br. in Opp. to Mot. for Protective Ord., Ex. A, App. 44.)

security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more." *Id.* at 1428.

The Government argued below that several purchasers of the Raymond's and Bernhoft's information binders did, in fact, commit lawless actions. (R. at 251, Pl.'s Mot. for Summ. J.) But the *Brandenburg* test does not rise and fall on the actions of listeners, but on the actual conduct of the speaker:

> Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in the preparation of any individual tax return. Rather, they merely instructed an audience on how to set up a particular tax shelter.

Id. at 1428 (citing *Brandenburg*, 395 U.S. at 444).

If the First Amendment protected Dahlstrom and his co-defendants, who actually advocated aggressive participation in a tax avoidance scheme which they knew could result in criminal and civil penalties against investors, how much more so are Bernhoft and Raymond protected from government attempts to silence their political speech? Much more so. Perhaps Justice Douglas's commentary on the abysmal Supreme Court First Amendment jurisprudence prior to *Brandenburg* can be applied to the Panel decision: "[T]he threats [aggressive political speech] were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous." *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring).

CONCLUSION

Arbitrary Government action is the enemy of ordered liberty, because the Government inevitably teaches the people by its own example. Lack of confidence in the regularity of Government action breeds contempt for the law. There is no public policy more important, therefore, than requiring Government officials to evidence the authority by which they act against citizens. Judicial insistence that Government actors possess proper delegated authority to perform official acts serves these paramount purposes – as does enforcing strict compliance with statutory authorization requirements when the Government sues its own citizens.

Ensuring uniformity of decision amongst the federal courts of appeal also serves these important goals, for an American citizen rightfully expects that the law will be equally and fairly applied – no matter how unpopular his beliefs or speech. In fact, we tolerate the speech we hate because one day our speech might be hated. Surely protecting a citizen's right to criticize his Government, and to exchange information toward that purpose with like-minded individuals, holds a higher place in our jurisprudence and philosophy than protecting books that teach how to build bombs or depict some novel form of sexual debauchery. The Petition for Writ of Certiorari should be granted forthwith in furtherance of these goals.

Respectfully submitted on this the 6th day of March, A.D. 2001.

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Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

Robert R. Raymond, individually and doing business as Morningstar Consultants, and Robert G. Bernhoft, individually and doing business as Morningstar Consultants,

Petitioners,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SEPARATE APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4024

[Entered September 26, 2000]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT R. RAYMOND, individually and doing business as MORNINGSTAR CONSULTANTS, and ROBERT G. BERNHOFT, individually and doing business as MORNINGSTAR CONSULTANTS,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 97-C-207—**Charles N. Clevert**, *Judge.*

ARGUED JUNE 2, 2000
DECIDED SEPTEMBER 26, 2000

Before FLAUM, *Chief Judge*, and EVANS and WILLIAMS, *Circuit Judges.*

Flaum, *Chief Judge.* Robert Raymond and Robert Bernhoft appeal the district court's entry of a permanent injunction preventing them from engaging in a number of activities related to the sale of a collection of materials known as the "De-Taxing America Program." For the reasons stated herein, we affirm.

I. BACKGROUND

Raymond and Bernhoft are active members of the U.S. Taxpayers Party and were the chief participants in a business known as Morningstar Consultants ("Morningstar"). Between January and June of 1996, Morningstar ran a weekly advertisement in a local Wisconsin newspaper under the caption "Just Say No." The Just Say No advertisement contained the following statements: 1) "Federal, State & Social Security Taxes are Voluntary;" and 2) "The Internal Revenue Service has no Statutory Authority to: Compel you to file a Tax Return, Require withholding from your paycheck, Levy or Lien your property, Audit your Books & Records." This advertisement was part of an effort by Morningstar to market the "De-Taxing America Program" (the "Program").

The Program consists of three volumes of materials. These materials contain information presenting the view that, among other things, the federal income tax is unconstitutional and that persons who are not federal employees or residents of the District of Columbia are not legally required to pay federal income tax. In addition to providing information regarding general tax-protest principles, the Program includes several forms and instructions to guide the purchaser through the process of "de-taxing." Purchasers are informed that if they complete the materials and directions in the Program they will be "withdrawn" from the jurisdiction of the federal govern-

ment's taxing authorities and the social security system and will no longer be required to pay federal taxes.

The materials in the Program are pre-printed with the purchaser's name and various personal information. The Program instructs the purchaser to, among other things, send pre-printed letters and numerous Freedom of Information Act ("FOIA") requests to various government agencies, including the Internal Revenue Service ("IRS"), the Social Security Administration ("SSA") and the Attorney General. Program customers are instructed to file W-4 forms with their employers asserting that they are exempt from federal taxation and requesting that the employers stop withholding federal income tax and social security payments from their paychecks. The Program also informs the purchaser that since any previous tax payments were made entirely voluntarily, he or she may request a refund of taxes paid in prior years. The Program then directs the purchaser to file several forms with the IRS requesting a refund of taxes paid over the previous three years. The Program also provides the purchaser with instructions on how to complete future tax returns to reflect that the purchaser has not incurred any tax liability in the previous year and consequently does not owe any federal income or social security taxes. The Program represents that all of the activities it instructs its purchasers to pursue are legal and that it is legal for purchasers to cease paying federal taxes after completing the instructions provided in the Program materials.

Morningstar sold the Program to fifty-five customers in several different states for a negotiated price ranging from $445 to $2,600 and earned at least $34,578 from the sale of the Program. At least 12 Program customers informed their employers that they were exempt from withholding and requested that the employers stop withholding federal tax payments from their paychecks.

At least 20 Program customers failed to file income tax returns for either the 1995, 1996 or 1997 tax year, which the IRS estimates resulted in a loss of $691,731 to the United States. In addition, the IRS estimates that it spent a total of 291 hours responding to more than 124 FOIA and Privacy Act requests sent by the appellants or their customers. The IRS also estimates that it spent more than 500 hours on administrative functions such as audits, responding to frivolous W-4 forms, and collecting delinquent taxes as a result of the conduct of persons who purchased Program materials.

By the summer of 1996, the appellants had stopped selling and promoting the Program. On November 15, 1996, the IRS informed the appellants that an investigation of their involvement with the sale of the Program had been completed and that the IRS would pursue penalties and a civil injunction as a result of this investigation. On March 3, 1997, at the request of IRS Assistant District Counsel Edward G. Langer, the Attorney General filed a civil suit under 26 U.S.C. § 7408, requesting a permanent injunction against the appellants' sale of the Program and against the appellants' participation in any conduct intended to interfere with the enforcement of the internal revenue laws.[1]

The suit was referred to a magistrate judge where the Government moved for summary judgment. The magistrate judge issued a report recommending that the Government's motion be granted and a permanent

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[1] Criminal charges were not pursued against the appellants because the Government determined that the amount of loss suffered by the United States did not warrant criminal penalties and because the Government was concerned that a criminal prosecution of the appellants would implicate the appellants' rights under the First Amendment.

injunction be entered against the appellants.[2] The magistrate's report also informed the parties that they had ten days to submit objections to the report and that failure to file objections within that time period "shall result in a waiver of your right to appeal all factual and legal issues." The appellants requested an extension of

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[2] The injunction entered against the appellants order that the appellants:

"are hereby ENJOINED, directly or indirectly from engaging or undertaking to engage in any and all of the following activities:

1. Inciting other individuals and entities to understate their federal tax liabilities, avoid the filing of federal tax returns, or avoid paying federal taxes based upon (a) the false representation that wages, salaries, or other compensation for labor or services are exempt from federal income taxation, or (b) any other such frivolous claim with respect to the scope of federal income taxation, or (c) any false or fraudulent claim regarding the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit for federal income tax purposes;
2. Advertising, marketing, or selling any documents or other information advising taxpayers that wages, salaries, or other income not specifically excluded from taxation under Title 26 of the United States Code are not taxable income.
3. Providing forms for or assisting any individual in the preparation of false Internal Revenue Forms W-4, W4E, 1040X, and any other form, return, or declaration claiming that the taxpayer is exempt from federal income taxation or entitled to excessive withholding allowances.;
4. Filing, providing forms for, or otherwise aiding and abetting the filing of frivolous Freedom of Information requests with the Internal Revenue Service; and
5. Engaging in any other conduct subject to penalty under Section 6700 of the Internal Revenue Code, Title 26 of the United States Code.

time to file their objections that the district court granted. However, the appellants did not file their objections until two days after the extended deadline. Because the appellants' objections were filed late, the district court issued an order adopting the magistrate's recommendation in its entirety without review. The appellants then filed a motion to reconsider that the district court denied because it found there was no excusable neglect for the appellants' late filing of their objections. The district court then went on to state that it would have adopted the magistrate's recommendation even if the appellants had filed their objections in a timely fashion. Raymond and Bernhoft now appeal.

II. DISCUSSION

A. JURISDICTION

The appellants first assert that the district court had no jurisdiction to hear this case because the Secretary of the Treasury had not authorized suit against the appellants as required by the provisions of 26 U.S.C. § 7408.[3]

The appellants assert that the district court receives jurisdiction from § 7408 to enter an injunction to enforce a violation of § 6700. However, the district court in fact is

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[3] Section 7408 provides in relevant part:

> (a) Authority to seek injunction—A civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700 . . . may be commenced at the request of the Secretary [of the Treasury] . . . . The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

granted jurisdiction to enter injunctions to enforce the provisions of the Internal Revenue Code ("IRC"), 26 U.S.C. § 1 et seq., through the broad grant of power authorized by § 7402(a).[4] Section 7402(a) explicitly grants district courts the authority to issue injunctions to enforce the tax laws and states that all remedies that are normally available to the United States to enforce its laws are not limited by that section.

Section § [sic] 7408, on the other hand, provides a cause of action for injunctive relief to the United States against a party suspected of violating the tax laws that is independent of any other cause of action. The specific provisions of that section, including the provision that the suit must be authorized by the Secretary of the Treasury or his delegate, are procedural and not jurisdictional. Therefore, even if we were to conclude that the United States had not received proper authorization from the Secretary of the Treasury, that fact would not affect the jurisdiction of the district court.

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[4] Section 7402(a) provides in pertinent part:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

However, we conclude that this suit was properly authorized by a delegate of the Secretary of the Treasury. On January 28, 1997, Edward G. Langer, Assistant District Counsel for the Internal Revenue Service, wrote a letter to Loretta C. Argrett, Assistant Attorney General for the Tax Division of the Department of Justice, requesting and authorizing that the Justice Department commence an action to seek injunctive relief against the appellants under 26 U.S.C. §§ 7402 and 7408. Assistant District Counsel Langer submitted a declaration to the district court asserting that he was duly authorized by the Secretary of the Treasury to request that this action be commenced. The appellants had ample opportunity to produce evidence that contradicts this declaration and have not done so. Therefore, we consider his declaration sufficient evidence of Langer's authority to authorize this suit. *See First National Bank v. Insurance Co. of N. Amer.*, 606 F.2d 760, 768 (7th Cir.1979) ("It is a general rule of summary judgment procedure that denying the allegations of affidavits supporting a motion for summary judgment does not, Ipso facto, create a genuine issue of material fact. Mere denials unaccompanied by statements of any facts which would be admissible in evidence at a hearing, are not sufficient to raise a genuine issue of fact.") (citation omitted); *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 n. 10 (7th Cir.1976) (stating that at the summary judgment stage uncontradicted affidavits are taken as true). Thus, we conclude that the district

court had jurisdiction to hear the Government's claims against Bernhoft and Raymond.[5]

B. WAIVER

The Government argues that because the appellants failed to file timely objections to the magistrate's report, they have waived their right to appeal all factual and legal issues to either the district court or to this Court.

In *Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), the Supreme Court held that a circuit rule permitting both the district court and the court of appeals to refuse to review a magistrate's report

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[5] The appellants have submitted a Motion to Strike Portions of Appellee's Brief, and Motion for an Order to Show Cause Why Government Counsel Should Not Be Sanctioned. These motions are based on the Government's inclusion in the appendix to its brief of two documents that were not included in the record before the district court below. The Government referred to these documents in a footnote to its brief and pointed out that the documents were not part of the record below.

We agree with the appellants that the inclusion of these documents in the Government's appendix was improper, and we have not relied on these documents in our consideration of this case. *See Berwick Grain Co., Inc. v. Illinois Dep't of Agric.*, 116 F.3d 231, 234 (7th Cir.1997) ("The appellate stage of the litigation process is not the place to introduce new evidentiary materials."); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1392 n. 4 (7th Cir.1990) (noting that references to facts outside the record are properly stricken). Therefore, we will grant the appellants' motion to strike these documents from the Government's appendix and references to these documents in the Government's brief.

However, we cannot conclude that the Government's conduct here merits sanctions. Therefore, we deny the appellants' motion for an order to show cause why the government should not be sanctioned.

absent timely objection does not violate the Constitution, provided that the parties are given clear notice that they may request an extension of time for filing objections and that their failure to file timely objections may result in their inability to appeal the magistrate's recommendation. The Court then noted that "because [this] rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice." *Id.* In *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir.1986), we adopted such a rule in this Circuit, concluding that failure to file objections to a magistrate's report with the district judge waives the right to appeal but that the party who failed to object has "the opportunity to demonstrate that it had sufficient cause for failing to object, such that waiver should not be applied." *Id.* at 539-40; *see also Provident Bank v. Manor Steel Corp.*, 882 F.2d 258, 261 (7th Cir.1989). In *Hunger v. Leininger*, 15 F.3d 664 (7th Cir.1994), we clarified our standard for determining when wavier should be found because objections to a magistrate's report are filed late. We concluded that waiver should not be applied where "the filing [of objections] was not egregiously late and caused not even the slightest prejudice to the [opposing party]." *Id.* at 668; *see also United States v. Robinson*, 30 F.3d 774, 777 (7th Cir.1994) (holding that the appellant had not waived his right to appeal where he filed objections to a magistrate's report two days late and the Government was not prejudiced by the late filing).

In this case, the appellants filed their objections to the magistrate's report only two days late. The objections were actually mailed on the day that they were due and the appellants claim that their error was based on a good faith misapprehension of the law—they thought the objections would be considered filed on the day they were mailed rather than the day they were received. In addition, the appellants were scrupulous in meeting all of

the other deadlines in this case. The Government has identified no prejudice that it incurred because of the late filing of the appellants' objections, and those objections were not egregiously late. Therefore, we decline to conclude that the appellants have waived their right to appeal, and we now address the merits of that appeal.

C. SUMMARY JUDGMENT

The district court granted summary judgment for the Government and entered a permanent injunction against the appellants forbidding them from engaging in certain activities that incited others to violate the tax laws. We review the district court's decision to grant summary judgment de novo, drawing all reasonable inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is appropriate only if there is no genuine dispute of material fact and judgment is appropriate as a matter of law. Fed.R.Civ.P. 56(c); *see Doe v. Cunningham*, 30 F.3d 879, 882 (7th Cir.1994).

The district court entered this injunction under 26 U.S.C. § 7408. Section 7408 grants a district court the authority to enter a permanent injunction against a defendant if it finds "(1) that the person has engaged in any conduct subject to penalty under section 6700 . . . , and (2) that injunctive relief is appropriate to prevent recurrence of such conduct." 26 U.S.C. § 7408(b); *United States v. Kaun*, 827 F.2d 1144, 1147 (7th Cir.1987). The appellants argue that there is a genuine issue of material fact as to whether the Government proved each of these elements and that, therefore, the district court erred in entering summary judgment for the Government.

1. Violation of 26 U.S.C. § 6700

In order to establish a violation of 26 U.S.C. § 6700, the Government must prove "(1) that the defendant was involved in an abusive tax shelter, and (2) that the defendant made statements about the tax benefits investors would receive if they participated in the shelter which the defendant knew or had reason to know were false or fraudulent." *Kaun*, 827 F.2d at 1147.

a. Tax shelter

Under § 6700 any "plan or arrangement" having some connection to taxes can serve as a "tax shelter" and will be an "abusive" tax shelter if the defendant makes the requisite false or fraudulent statements concerning the tax benefits of participation. *See* 26 U.S.C. § 6700(a)(1)(A); *Kaun*, 827 F.2d at 1147.[6] In *United States v. Kaun*, we

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[6] Section 6700 of Title 26 of the United States Code provides monetary penalties for:

(a) . . .—Any person who—

(1)(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter . . . .

held that the definition of a tax shelter in § 6700 is "clearly broad enough to include a tax protester group." *Kaun*, 827 F.2d at 1148. In that case, we concluded that the Wisconsin Society for Educated Citizens ("WSEC"), an organization whose primary purpose was to incite members to evade the tax laws by engaging in a variety of activity disruptive to the IRS including the filing of false or fraudulent returns, was a plan or arrangement that operated as an abusive tax shelter as defined by § 6700. *Id.* at 1149.

In this case, the appellants participated in Morningstar Consultants in order to promote and sell the De-Taxing America Program. The Program purported to provide step-by-step instructions for "removing" the purchaser from the federal income and social security tax systems. The Program materials assured readers that the federal government is without authority to tax them and that by following the instructions outlined in the Program individuals can legally refuse to pay federal income and social security tax. Several of Morningstar's customers took steps to evade the federal tax laws and filed false or fraudulent income tax returns relying on the instructions and assertions made in the Program materials. As with the WSEC in Kaun, we conclude that the Program is a tax shelter as defined by § 6700 and that the appellants' sale of the Program to over 55 customers in several states through the business known as Morningstar Consultants is the sale of an interest in a plan that constitutes a tax shelter as defined by § 6700(a)(1)(B).

b. False statements concerning tax benefits

In order to prove a violation of § 6700, the Government must also show that the appellants made false or fraudulent statements concerning the tax benefits of participating in the plan or arrangement. 26 U.S.C. §

6700(a)(2)(A); *Kaun*, 827 F.2d at 1147. In *Kaun*, the defendant held WSEC meetings where he encouraged members and potential members to file frivolous FOIA requests, request that their employers forego withholding federal taxes from their paychecks, file false tax returns, and file fraudulent requests for tax refunds. *Id.* at 1149. We held that this activity was sufficient to satisfy the false or fraudulent statements element of § 6700.

In this case, there is a disputed question of fact concerning whether the appellants held meetings where they made statements to Program customers and potential customers that encouraged them to evade federal tax laws. However, it is undisputed that from January through June of 1996, the appellants ran the "Just Say No" advertisement in a local Wisconsin paper in an effort to induce potential customers to purchase the De-Taxing America Program. In that advertisement, the appellants made the representations that payment of income tax is a voluntary activity and that individuals cannot be legally compelled to file tax returns or submit to tax investigations or penalties. The advertisement directed readers to contact Morningstar Consultants "for more information" regarding these assertions. Upon contacting Morningstar, callers were encouraged to purchase the De-Taxing America Program, and several individuals in fact purchased the Program from the appellants.

The statements appellants made in the Just Say No advertisement are clearly false representations concerning the government's authority to tax its citizens. *See, e.g.*, *United States v. Hilgeford*, 7 F.3d 1340, 1342 (7th Cir.1993) (stating that the argument that an individual is a sovereign citizen of a state who is not subject to the jurisdiction of the United States and not subject to federal taxing authority is "shop worn" and frivolous); *United*

States v. Sloan, 939 F.2d 499, 500-01 (7th Cir.1991) (same); *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68, 70-72 (7th Cir.1986) (stating that the assertions that the federal income tax is not a tax on all income, that wages are not income, and that a tax on wages is unconstitutional are "tired arguments" that are "objectively frivolous"); *Kile v. Commissioner of Internal Revenue*, 739 F.2d 265, 267-68 (7th Cir.1984) (noting the "universal and longstanding rejection" of the argument that wages are not subject to income tax and that the federal income tax is unconstitutional). These statements made in conjunction with the sale of the Program operated as false assurances that refusing to pay taxes in accordance with the Program's instructions is a lawful activity for which the government has no legal authority to punish Program subscribers. As the district court noted, the appellants are intelligent men. Bernhoft has recently graduated from the University of Wisconsin Law School. Raymond has run his own business for twenty years and was the U.S. Taxpayers Party's candidate for the United States Senate. We attribute to both appellants a basic knowledge of the law such that they should reasonably be aware that their personal belief that paying taxes is a voluntary activity does not represent the current state of the law. Therefore, we conclude that the statements the appellants made in the Just Say No advertisement were representations concerning the tax benefits of purchasing and following the De-Taxing America Program that the appellants reasonably should have known were false.

Because the appellants participated in the sale of the abusive tax shelter that is the De-Taxing America Program and because the appellants made false or fraudulent statements concerning the benefits to be derived from the Program, we conclude that the district court did not err in finding that the appellants' conduct violated 26 U.S.C. § 6700.

2. Likelihood of Recurrence

The appellants next contend that the district court erred when it found that a permanent injunction was necessary to prevent the appellants from engaging in unlawful activity in the future. They assert that because they stopped selling the Program before they were even aware that the government was investigating their activities and because they submitted declarations to the district court that they would not sell the Program in the future, the district court erred in concluding that there was a significant chance that the appellants would engage in unlawful activity such that a permanent injunction was required.

In order to determine whether there is a significant likelihood that the appellants' involvement in the illegal activity at issue in this case will reoccur, we examine the totality of the circumstances surrounding the appellants and their violation of the law. *See Kaun*, 827 F.2d at 1149. We look at factors such as: (1) "the gravity of harm caused by the offense;" (2) "the extent of the defendant's participation and his degree of scienter;" (3) "the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transaction;" (4) "the defendant's recognition of his own culpability;" and (5) "the sincerity of his assurances against future violations." *Id.* at 1149-50; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

The appellants first challenge the district court's finding that their activities significantly harmed the United States. The appellants assert that the district court erred when it chose to believe the assertions of IRS investigators as to the amount of loss suffered by the United States as a result of the refusal of Program

customers to pay taxes, the numerous FOIA and Privacy Act requests that were prompted by Program instructions to which various federal agencies were required to respond, and the investigation and collection activities that the IRS was required to pursue in response to Program customers' refusal to pay taxes, requests for refunds and requests that taxes not be withheld from their paychecks. The appellants note that no criminal charges were pressed against them in part because the Assistant United States Attorney in charge of prosecuting their case determined that the loss to the government was not significant enough to merit a criminal prosecution. The appellants assert that this fact creates a genuine issue of material fact as to whether the loss was significant enough to merit a permanent injunction.

The Government presented the declarations of several Program customers who admitted failing to file income tax returns, filing requests for refunds to which they were not entitled, and submitting numerous FOIA requests. In addition, the Government presented the declarations of IRS officers regarding the administrative burden placed on the IRS when it was required to respond to Program customers' information requests, investigate Program customers' unlawful tax evasion activities, and engage in collection efforts for taxes that were not paid by Program subscribers. While disputes about the amount of loss make it difficult to determine at this stage the actual loss suffered by the United States as a result of the appellants' activities, it is clear from the record that a significant loss did in fact result. The fact that the Justice Department did not consider this loss worthy of criminal sanction does not contradict this determination. *See United States v. Palumbo Brothers, Inc.*, 145 F.3d 850, 860 (7th Cir.1998) (noting that conduct that violates civil labor laws must be analyzed independently to determine whether it also merits criminal sanctions). Therefore, we

conclude that the district court did not err when it found that the appellants' activities in selling and promoting the Program caused a loss to the government sufficient to support the need for a permanent injunction.

Appellants do not dispute that they were the primary figures in Morningstar Consultants or that Morningstar's chief purpose was to sell the De- Taxing America Program. Therefore, we conclude that the appellants were significant participants in the sale of the "abusive tax shelter" that is the subject of this case. Furthermore, when customers contacted Morningstar to purchase the Program, they were asked to provide personal information that would be included on the preprinted forms that were part of the Program materials. Thus, we also conclude that the appellants acted with the intent that Program purchasers follow the instructions provided in the Program materials and submit the forms and letters contained therein. In addition, the appellants' activities were not an isolated instance of misconduct but consisted of the sale of the Program to at least 55 persons over a six month period.

Moreover, the appellants have expressed no remorse concerning their participation in the unlawful activities at issue here. Throughout the documents they presented to the district court and during oral argument before this Court, the appellants consistently held to their view that federal tax laws are unconstitutional and that the government has no authority to compel the payment of federal taxes. In *Kaun*, we concluded that the fact that the defendant "steadfastly maintained his total lack of culpability" was an indication that he would likely engage in similar unlawful activity in the future in the absence of an injunction prohibiting such activity. 827 F.2d at 1150. This case does differ from *Kaun*, in that the appellants here stopped selling the Program before the IRS investiga-

tion of their activities had come to fruition and have asserted before the district court that they will not engage in such activities in the future.

We recognize that the defendants had not been involved in the challenged activity for several months before the action to enjoin this activity was commenced. However, while voluntary cessation of unlawful activity and promises not to engage in that activity in the future are relevant to determining the necessity of an injunction, they do not lead inevitably to the conclusion that an injunction is unnecessary. *See W.T. Grant Co.*, 345 U.S. at 633 ("Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct."); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir.1999). The appellants continue to be active members of the U.S. Taxpayers Party and continue to forcefully advocate their beliefs regarding the alleged dubious legality of the federal tax system. In addition, they have refused to acknowledge that their conduct in this matter was anything other than perfectly lawful. In light of these facts, we conclude that their claims that they will not engage in unlawful activity in the future are insufficient to overcome the other circumstances that indicate that there is a significant likelihood that the appellants will again incite others to violate the tax laws. *See Haywood v. North Am. Van Lines, Inc.*, 121 F.3d 1066, 1071 (7th Cir.1997) ("[C]onclusory allegations and selfserving affidavits, if not supported by the record, will not preclude summary judgment."); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295 (7th Cir.1993) ("Self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."). Accordingly, the district court was justified in finding that

a permanent injunction was necessary under these circumstances.

D. FIRST AMENDMENT

The appellants finally argue that the injunction entered against them by the district court violates their right to freedom of speech. The appellants contend that their activities concerning the promotion and sale of the DeTaxing America Program constitute political advocacy that is protected by the First Amendment and that the district court's injunction is an unconstitutional prior restraint on political speech.

The injunction issued by the district court in this case is virtually identical to the injunction at issue in *Kaun*.[7] *See* 827 F.2d at 1146 n. 1. In that case, we expressed our grave concern regarding the constitutionality of the injunction issued by that district court. However, we elected to construe the injunction narrowly so that its provisions fit within the bounds of the Constitution rather than strike down the injunction and require the district court to fashion a more narrowly-drawn order. *See id.* at 1150. Like the Kaun injunction, we conclude that the injunction here is a prior restraint on speech. *See id.*; *see*

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[7] The injunctions are identical with the following exceptions:

In the first paragraph the words "Organizing, selling, or assisting in the organization of an entity or otherwise promoting any plan or arrangement based upon in the *Kaun* injunction, *see* 827 F.2d at 1146 n. 1, have been replaced by the words "Inciting other individuals and entities to understate their federal tax liability, avoid the filing of federal tax return, or avoid paying federal taxes based upon . . . ."

The fifth paragraph of the *Kaun* injunction regarding the filing of frivolous lawsuits has been omitted and the sixth paragraph of the *Kaun* injunction is re-numbered as the fifth paragraph of the instant injunction.

also Alexander v. United States, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."). However, as in *Kaun*, we construe the injunction narrowly such that it is not an impermissible prior restraint that violates the First Amendment rights of the appellants.

The district court has re-written the first paragraph of the *Kaun* injunction so that it clearly applies only to activities that incite others to violate the tax laws. Incitement to imminent unlawful activity is unprotected speech, *see Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), and an individual may be enjoined from engaging in it. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47-48, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Near v. Minnesota*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As in *Kaun*, we interpret this paragraph to mean that the appellants may be found in contempt only where the evidence shows that they "actually persuaded others, directly or indirectly, to violate the tax laws" or if their "words and actions were directed toward such persuasion in a situation where the unlawful conduct was imminently likely to occur." 827 F.2d at 1151-52. With this interpretation, the first paragraph of the injunction poses no constitutional difficulties.

The second paragraph of the injunction pertains to advertising, marketing or selling documents that provide false income tax advice. Following our reading of the *Kaun* injunction, we interpret the second paragraph to prohibit only false, deceptive or misleading commercial speech that is related to the provision of tax advice. 827 F.2d at 1152.

It is permissible for the government to prevent the dissemination of false or misleading commercial speech. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Therefore, the second paragraph, as we now construe it, does not exceed the government's power to constitutionally regulate speech.

The third paragraph relates to the provision of materials or assistance for the filing of false IRS forms. As with the first paragraph, we read the third paragraph to prevent only speech used to further the imminent illegal activity of preparing false tax forms. *See Kaun*, 827 F.2d at 1152. As noted above, speech intended to incite imminent unlawful activity is not constitutionally protected. Therefore, this paragraph, as we read it, does not present First Amendment concerns.

The fourth paragraph prohibits the filing of frivolous FOIA requests with the IRS. In *Kaun*, we held that frivolous FOIA requests, like frivolous litigation, are not constitutionally protected. *Id.* at 1153. Therefore, we conclude that the fourth paragraph of the injunction also poses no constitutional difficulties.

The fifth paragraph of the injunction is simply a flat prohibition on activity that violates 26 U.S.C. § 6700. As noted above, courts may enjoin illegal activity without running afoul of the constitution.

As with the injunction in *Kaun*, we have narrowly construed the provisions of the district court's injunction in order to preserve it from the constitutional difficulties

that a broader reading would present. However, we caution district courts, wherever possible, to craft injunctions that are not in need of narrowing constructions by this Court. Although we did not strike down the injunction in *Kaun*, we expressed our serious concerns regarding the potential breadth with which the language used by that district court could be read. *Kaun*, 827 F.2d at 1150, 1151. Rather than simply repeating that language and depending on this Court's restrictive reading to avoid constitutional complications, the district court should have drafted in the first instance an injunction that was narrowly tailored to prohibit only those activities that can be restrained consistent with the First Amendment. However, as in *Kaun*, we have construed this district court's injunction narrowly and conclude that under this restrictive reading, the injunction does not violate appellants' First Amendment rights.

III. CONCLUSION

For the foregoing reasons, the district court's entry of a permanent injunction preventing the defendants from engaging in various activities related to the sale of the "De-Taxing America Program" and the incitement to violate federal tax laws is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[Entered July 27, 1999]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil
Robert R. Raymond, individually	)	Action No.
and d/b/a Morningstar Consultants	)	97-C-207
and Robert G. Bernhoft,	)	
individually and d/b/a	)	
Morningstar Consultants,	)	
	)	
Defendants	)	

ORDER ADOPTING JUNE 17, 1999 RECOMMENDATION IN ITS ENTIRETY AND DISMISSING CASE WITH PREJUDICE

On June 17, 1999, Magistrate Judge William Callahan issued a recommendation which advised this court to grant plaintiff's motion for summary judgment as well as the plaintiff's petition for permanent injunctive relief against the defendants. The parties were advised that any

objection to the recommendation must be filed with the Clerk of Court within ten days of service. Fed. R. Civ. P. 72; Local Rule 13.03 (E.D. Wis.). This court subsequently extended the time for the defendant to either object to or appeal the recommendation until July 26, 1999. Defendants have failed to file a timely objection to or appeal of the recommendation. A district court is not required to review a magistrate judge's factual or legal conclusions when neither party objects to those findings. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Am, 474 U.S. 140, 155, 106 5. Ct. 466, 472-73 (1985). Hence, the magistrate judge's recommendation will be adopted in its entirety.

Now therefore,

IT IS ORDERED that Magistrate Judge Callahan's recommendation dated June 17, 1999 (doc. # 347) is adopted in its entirety.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment (doc. #251) is granted.

IT IS FURTHER ORDERED that plaintiff's petition for permanent injunctive relief against the defendants is granted.

IT IS FURTHER ORDERED that this case is dismissed with prejudice.

Dated at Milwaukee, Wisconsin this 27th day of July, 1999.

BY THE COURT

/s/ C. N. CLEVERT
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[Entered July 27, 1999]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil
Robert R. Raymond, individually	)	Action No.
and d/b/a Morningstar Consultants	)	97-C-207
and Robert G. Bernhoft,	)	
individually and d/b/a	)	
Morningstar Consultants,	)	
	)	
Defendants	)	

This action came before the court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed with prejudice.

IT IS FURTHER ORDERED that the defendants, Robert R. Raymond and Robert G.Bernhoft, both individually and doing business as Morningstar Consultants, and defendants' agents, servants, employees, attorneys, and

all those in active concert or participation with them, pursuant to Fed. R. Civ. P. 65, are hereby **ENJOINED**, directly or indirectly from engaging or undertaking to engage in any and all of the following activities:

1. Inciting other individuals and entities to understate their federal tax liabilities, avoid the filing of federal tax returns, or avoid paying federal taxes based upon (a) the false representation that wages, salaries, or other compensation for labor or service are exempt from federal income taxation, or (b) any other such frivolous claim with respect to the scope of federal income taxation, or (c) any false or fraudulent claim regarding the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit for federal income tax purposes;

2. Advertising, marketing, or selling any documents or other information advising taxpayers that wages, salaries, or other income not specifically excluded from taxation under Title 26 of the United States Code are not taxable income;

3. Providing forms for or assisting any individual in the preparation of false Internal Revenue Forms W-4, W4E, 1040X, and any other form, return, or declaration claiming that the taxpayer is exempt from federal income taxation or entitled to excessive withholding allowances;

4. Filing, providing forms for, or otherwise aiding and abetting the filing of frivolous Freedom of Information requests with the Internal Revenue Service; and

5. Engaging in any other conduct subject to penalty under Section 6700 of the Internal Revenue Code, Title 26 of the United States Code.

APPROVED:

/s/ C.N. CLEVERT
U.S. District Judge

SOFRON B. NEDILSKY
Clerk

7-27-99
Date

(By) Deputy Clerk
/s/ Kristine Wilson

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[Entered June 17, 1999]

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 97-CV-207

v.

June 17, 1999

ROBERT R. RAYMOND, individually and d/b/a Morningstar Consultants; and ROBERT BERNHOFT, individually and d/b/a Morningstar Consultants,

Defendants.

ORDER AND RECOMMENDATION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' DECLARATIONS, PLAINTIFF'S MOTION TO EXCEED PAGE LIMITATION, AND DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S REPLY BRIEF

I. BACKGROUND

The United States of America commenced this action against Robert R. Raymond ("Raymond") and Robert G. Bernhoft ("Bernhoft") on March 3, 1997, to permanently enjoin them from: (1) organizing or selling the "De-Taxing

America Program", (hereinafter sometimes referred to as "the Program",) arguing that such program is an abusive tax shelter within the meaning of Section 6700 of the Internal Revenue Code of 1986 (26 U.S.C.), and (2) engaging in other conduct that substantially interferes with the proper administration of the internal revenue laws. The United States proceeds under Section 7408 of the Internal Revenue Code, which authorizes the district courts to enjoin persons from selling abusive tax shelters or other abusive tax avoidance schemes. It also proceeds under Section 7402(a) of the Internal Revenue Code, which gives the district court jurisdiction to issue injunctions "necessary or appropriate for the enforcement of the internal revenue laws." Under that section, the United States argues that a district court may enjoin activities that interfere with the enforcement of those laws.

According to the United States, the defendants, Raymond and Bernhoft, engaged in conduct subject to penalty under Section 6700 of the Internal Revenue Code by promoting and selling the "De-Taxing America Program," a plan or arrangement which provided instructions for avoiding taxes by illegal means. The plaintiff maintains that the defendants furnished false statements with respect to the tax benefits available to purchasers of the "De-Taxing America Program," and knew or had reason to know that those statements were false. Moreover, the United States argues that the defendants are likely to continue conduct that is violative of Section 6700, and injunctive relief is appropriate to prevent recurrence of such conduct.

According to the plaintiff, Raymond and Bernhoft have engaged in numerous activities that interfere with the enforcement of the internal revenue laws. Specifically, through their promotion and sale of the "De-Taxing

America Program", the defendants have provided false and fraudulent tax advice, advised purchasers of the "De-Taxing America Program" how to file false withholding forms and tax refund claims, and have instructed individuals on ways to engage in abusive conduct against IRS personnel, which conduct is calculated to interfere with the enforcement of the tax laws. The plaintiff maintains that the defendants' activities threaten substantial irreparable harm to the Government through the loss of revenue and interference with the proper administration of the tax laws. Thus, the plaintiff seeks injunctive relief against the defendants.

In arguing against the plaintiff's motion for summary judgment, the defendants set forth essentially four arguments: (1) that certain government actors were not proper delegates of the Secretary of the Treasury for purposes of authorizing, bringing, and maintaining this civil action against them; (2) that material facts are in dispute concerning whether the information referred to in this case as the "De-Taxing America Program" constitutes an abusive tax shelter within the meaning of 26 U.S.C. §§ 6700 and 7408; (3) that material facts are in dispute concerning whether the defendants made false statements as to the allowance of any tax deduction that would have affected the decision of a reasonable prudent investor to purchase and interest or share in the "De-Taxing America Program"; and (4) that material facts are in dispute concerning whether the injunction is necessary and appropriate to prevent the recurrence of the conduct.

The plaintiff's motion is now fully briefed and ready for resolution.[8] Because not all the parties have consented to magistrate judge jurisdiction, this court's jurisdiction is limited. See 28 U.S.C. § 636(b)(1).

For the reasons which follow, I am persuaded, and therefore recommend, that the plaintiff's motion for summary judgment be granted and that an injunction be issued.

II. PLAINTIFF'S MOTION TO STRIKE

Before even addressing the substance of the plaintiff's motion for summary judgment, it is necessary to address the plaintiff's motion to strike the defendants' declarations. In its motion, the plaintiff seeks an order striking: (1) paragraphs 14 through 24, inclusive, of the Third Declaration of Bernhoft, and (2) paragraphs of 14 through 24, inclusive, of the Fourth Declaration of Raymond. In support of its motion, the plaintiff argues that, at their respective depositions, each of the defendants declined to answer certain questions propounded by plaintiff's counsel

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[8] The plaintiff's reply brief is 34 pages long and, therefore, exceeds the page limitation of Local Rule 6.01(c). Over one month after it was filed, the defendants filed a motion to strike the reply brief because of its length. On the heels of the defendants' motion, the plaintiff filed a motion for leave to exceed the page limitation of Local Rule 6.01(c), nunc pro tunc.

This case has been hard fought. Numerous motions and discovery disputes have peppered its progress. Indeed, the file now takes up several filing cabinet drawers. But, it is time to bring it to a close. And, in order to afford the plaintiff an opportunity to address the defendants' multi- faceted attack of the plaintiffs' claim, I believe it should be allowed to have the court consider its reply brief. Accordingly, the plaintiffs' motion for leave to exceed the page limitations of Local Rule 6.01(c) nunc pro tunc is GRANTED and the defendants' motion to strike the plaintiffs' reply brief is DENIED.

based on their invocation of the Fifth Amendment privilege against self-information. [sic]. Because the United States was deprived of discovery at the defendants' depositions, the defendants should be precluded from offering the testimony contained in the above- referenced paragraphs of the defendants' respective declarations. Moreover, according to the United States, the testimony set forth in the above-referenced paragraphs is "inconsistent with the rationale underlying their invocation of the Fifth Amendment privilege at their depositions in this case, and may not be used to defeat the Government's summary judgment motion." (Plaintiff's Motion to Strike, paragraph 7).

The defendants acknowledge that they selectively declined to answer certain questions at their respective depositions, based on their Fifth Amendment privilege. Nevertheless, they argue that this court should not strike the targeted paragraphs of their respective declarations. This is because:

> (1) defendants' selective Fifth Amendment refusal to answer certain questions at their respective depositions was made in good faith, and subsequently waived and withdrawn in good faith; (2) plaintiff is not prejudiced by defendants' waiver and timely withdrawal of their Fifth Amendment assertions; (3) defendants must be permitted to oppose plaintiff's motion for summary judgment with other evidence bearing on subject matter plaintiff never queried during depositions or discovery or to which queries defendants fully testified; and (4) the legitimate ends of justice and truthful resolution of this controversy are furthered by denying plaintiff's motion to strike defendants' declarations.

(Defendants' Brief In Opposition To Plaintiff's Motion To Strike, page 1).

According to the plaintiff, at each of the defendant's respective depositions, which were conducted on March 10 and March 12, 1998, they consistently declined to provide any information concerning their roles in the organization and sales of the "De-Taxing America Program" by repeatedly invoking the Fifth Amendment privilege against self incrimination. Now, however, they have each submitted declarations in opposition to the plaintiff's motion for summary judgment setting forth information that they previously declined to give during the course of their depositions on the ground that such information would incriminate them. Citing a line of cases, the holdings of which are fairly represented by the court's holding in **In re Edmond**, 934 F.2d 1304 (4th Cir.1991), the plaintiff presents that "[a]lthough compelled self-incrimination is forbidden by the Fifth Amendment, the federal courts have not hesitated to forbid parties from asserting the Fifth Amendment privilege against discovery and then attempting to convert it to a sword by testifying at trial or submitting a self-serving affidavit in an effort to defeat a properly supported motion for summary judgment." (Plaintiff's Memorandum of Law, p.8). To be sure, the courts have so acted. But, they have so acted when they were persuaded that the party whose conduct was being examined had used the invocation of the privilege to manipulate the discovery process. In other words, courts do not take kindly to, for instance, a party's "selectively asserting his Fifth Amendment privilege,[and thereby attempting] to insure that his unquestioned, unverified affidavit would be the only version [of the facts]...[T]he Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support [or oppose] a motion for summary judgment." **In re Edmond**, 934 F.2d at 1308. After all, the Fifth Amendment is "not a 'positive invitation to mutilate the

truth a party offers to tell.'" **Lawson v. Murray**, 837 F.2d 653, 656 (4th Cir.1988).

But, I am not persuaded that a party should, under all circumstances, be precluded from offering an affidavit in support of, or in opposition to, a motion for summary judgment just because he refused to answer deposition questions on the same subject matter based on his Fifth Amendment privilege. Instead, "[a] trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment. Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." **Securities and Exchange Commission v. Nash**, 25 F.3d 187, 192 (3rd Cir.1994).

That said, it now becomes necessary for me to examine the case at hand and decide whether, under all the circumstances, precluding the defendants from offering declarations (or, more precisely certain portions of declarations) in opposition to the plaintiff's motion for summary judgment is an appropriate measure to take in light of the defendants' admitted invocation of the Fifth Amendment in refusing to answer certain questions at their respective depositions.

According to the defendants, who are proceeding pro se, their refusal to answer certain questions at their respective depositions was made in good faith, based on a demonstrably reasonable fear of criminal prosecution. Specifically, according to Bernhoft, prior to his March 10, 1998 deposition, he offered to testify fully to any and all questions relating to the De-Taxing America Program if the United States would agree to grant him some acceptable form of immunity; this offer, according to

Bernhoft, was rejected By U.S. Department of Justice Tax Division Senior Trial Attorney Robert D. Metcalfe, III. (Fourth Declaration of Bernhoft, paragraph 8). Similarly, based on a series of events more fully set out in his Sixth Declaration, defendant Raymond "believe[d] that any information gained by the Department of Justice in our civil case could be used in a criminal case. Based on my previous experiences with the IRS I believe[d] that they were predisposed to filing a criminal action against me."

Apparently, Bernhoft's and Raymond's fears of possible criminal prosecution were well founded. In December, 1998, Bernhoft received a response from the IRS national office to a FOIA request served on the IRS by Raymond and him. The information obtained through such request revealed that at least from December 19, 1995 to November 13, 1996, Morningstar Consultants had been the subject of a criminal investigation into possible violations of the federal mail and wire fraud statutes, stemming from its alleged sales of "tax protester packages which contain fraudulent claims concerning tax filing requirements." (Fourth Declaration of Bernhoft, Exhibit B). Indeed, in that same response is found a "Memorandum of Interview or Activity" which indicates that on April 25, 1996, Assistant United States Attorney Francis D. Schmitz "declined to pursue criminal prosecution **at this time** of MORNINGSTAR CONSULTANTS, as the scheme has been identified early enough to stop financial losses to the government. He felt that an undercover operation could reveal a larger criminal fraud scheme. The known activity appears to constitute 'freedom of speech' on the part of protest groups. **At this time**, the case lacks prosecutive merit." (emphasis provided).

What the foregoing demonstrates to me is that the defendants' invocation of the Fifth Amendment during the course of their respective depositions was not done for the

purpose of manipulating the discovery process. It was done, instead, because they had reasonable cause to believe that the government was not only looking into their activities in connection with Morningstar Consultants for purposes of this lawsuit, but could (and perhaps would) use whatever information was gathered in putting together a criminal prosecution against them.

To be sure, the plaintiff in this case may have preferred to have the defendants' full deposition testimony rather than the somewhat limited testimony that it actually did receive. But, I cannot say that the plaintiff was substantially prejudiced by the defendants' invocation of their Fifth Amendment rights. After all, the plaintiff was able to take the depositions of numerous individuals who claim to have had contact with the defendants concerning the De-Taxing America Program. Indeed, it is the depositions of those individuals, together with numerous bank records (as well as, of course, the De-Taxing America Program itself) that form the heart of the plaintiff's motion for summary judgment. In other words, the plaintiff has "been able to thoroughly prepare its case and was not solely dependent on the defendant[s] for pertinent information." **Graystone Nash**, 25 F.3d at 192. Moreover, it is hard to imagine that the plaintiff would have obtained from the defendants at their depositions any more admissions than the defendants have now made in their declarations. And, in any event, the fact that the defendants have now submitted declarations does not stand in the way of the court's still drawing an adverse inference from their previous refusals to answer certain questions. "Adverse inferences are based upon the logic that '[s]ilence is often evidence of the most persuasive character.'" **Daniels v. Pipefitters' Assoc. Local Union No. 597**, 983 F.2d 800, 802 (7th Cir.1993).

In conclusion, I am not persuaded that the defendants' declarations, or any portions thereof, should be stricken based on the defendants' having previously invoked their Fifth Amendment rights at their respective depositions. Their declarations will be considered by me in my consideration of the plaintiff's motion for summary judgment. Thus, the plaintiff's motion to strike the defendants' declarations is **DENIED**.

III. FACTS

In support of its motion for summary judgment the plaintiff, in accordance with Local Rule 6.05 (E.D.Wis.), filed 71 proposed findings of fact. In their responsive materials the defendants filed responses to the plaintiff's proposed findings of fact, in accordance with Local Rule 6.05(b). Many of the defendants' responses, however, do not delineate particular proposed findings that are in dispute. Rather, they merely challenge the veracity of Revenue Agent Jeffrey Palmer of the Internal Revenue Service. For instance, in a number of their responses to the plaintiff's proposed findings the defendants state:

> Defendants dispute this factual assertion to the extent it purports to convey the factual assertions of Fictitious IRS Revenue Agent Jeffrey Palmer (Palmer). Palmer's credibility is sufficiently in issue such that any of his assertions are properly excluded from supporting plaintiff's motion for summary judgment. Further, Palmer's declarations are sworn to under a fake name, or "registered pseudonym," and such declarations are not permitted by Fed.R.Civ.P. 56 in support of motions for summary judgment.

This is insufficient to raise a genuine issue of material fact such as to preclude summary judgment, assuming of course that the plaintiff otherwise demon-

strates entitlement to summary judgment. This is because such conclusory allegations are just that, i.e. conclusory allegations. They fail to clearly delineate only those findings to which it is asserted that a genuine issue of material fact exists, referring to the particular contested finding and citing evidentiary materials which support the claim that a dispute exists. In deciding a motion for summary judgment, the court will conclude that there is no genuine issue as to any proposed finding of fact to which there is no proper response. See, Local Rule 6.05(b)(1).

Additionally, the defendants raise, in their responses, a claim that certain bank records which are referenced in the plaintiff's proposed findings and which support certain of those findings were "unlawfully obtained, and are therefore properly excluded from consideration in support of plaintiff's motion for summary judgment". Once again, however, this does not serve to raise a genuine issue of material fact. How the United States obtained the particular bank records in question is irrelevant for purposes of deciding whether there is a genuine issue of material fact as to what those records may demonstrate.

Finally, it is important to keep in mind that neither "the mere existence of some alleged factual dispute between the parties," **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), nor the demonstration of "some metaphysical doubt as to the material facts," **Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.**, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), will sufficiently demonstrate a genuine issue of material fact. Moreover, it is only a genuine issue of material fact that will stand in the way a of a court's granting a properly supported motion for summary judgment.

All that said, a review of the parties' proposed findings of fact and responses thereto show the following to be the undisputed material facts in this case. Additional facts relevant to this court's recommendation may be found in the body of the recommendation.

A. The Internal Revenue Service Investigation Into The Sale Of The "De-Taxing America Program"

1. Revenue Agent Jeffrey Palmer of the Internal Revenue Service, prior to the filing of the complaint in the present civil action on March 3, 1997, conducted an investigation into the sale of the "De-Taxing America" program by the defendants, Robert R. Raymond and Robert G. Bernhoft. Declaration of Jeffrey Palmer (hereinafter, "Palmer Decl."), ¶¶ 5-23."

2. Based upon information provided to him as the Illegal Tax Protestor Coordinator, Revenue Agent Palmer commenced an investigation into the sale of the "De-Taxing America" package by Robert R. Raymond and Robert G. Bernhoft through an entity known as "Morningstar Consultants" on June 24, 1996. Palmer Decl., ¶ 15. It is possible, however that his civil investigation of the defendants as early as August of 1995.

3. Revenue Agent Palmer learned through a telephone call he placed to Lakeshore Newspapers, Inc. that Morningstar Consultants ran weekly newspaper advertisements in the Ozaukee County News Graphic between January 18, 1996 and June 6, 1996 which advertised, under the caption "Just Say No," that the payment of federal income and social security taxes is voluntary. This advertisement further stated that "[t]he Internal Revenue Service has no Statutory Authority to:

Compel you to File a Tax Return
Require withholding from your paycheck

Levy or Lien your property
Audit your Books & Records"

Palmer Decl., ¶ 6; Third Declaration of Jeffrey Palmer ("Third Palmer Decl."), ¶ 14.

4. Readers of this advertisement were instructed to contact Morningstar Consultants, P.O. Box 227, Port Washington, WI 53074 for further information. A true and correct copy of this advertisement, as it appeared in the Ozaukee County News Graphic between January 18, 1996 and June 6, 1996, is attached to the Declaration of Jeffrey Palmer as Exhibit 1. Palmer Decl., ¶ 6.

5. Copies of the Individual History Detail for the advertisement "Just Say No" (which Revenue Agent Palmer obtained from the Lakeshore Newspapers, Inc./Ozaukee County News Graphic), and a copy of the check drawn on the account of the "Bounty Trust" at the Ozaukee Bank on January 16, 1996 in favor of Lakeshore Newspapers in the amount of $99.20 (which Revenue Agent Palmer obtained from Lakeshore Newspapers, Inc.), are attached to the Third Declaration of Jeffrey Palmer as Exhibit 6. In the memorandum section of the January 16, 1996 check described above, the words "Morningstar Ad" appear. Third Palmer Decl., ¶ 14.

6. Attached to the Declaration of Revenue Agent Palmer as Exhibit 2 is a true and correct copy of "The Great Snow Job" by Barrie Konicov, which he obtained during the course of his investigation. Included in "The Great Snow Job" is a copy of promotional literature which identifies Robert R. Raymond and Robert G. Bernhoft as being associated with Morningstar Consultants. Palmer Decl., ¶ 17.

7. Attached to the Declaration of Revenue Agent Palmer as Exhibit 3 is a copy of "De-Taxing America

Information" which was downloaded from the Barrie Konicov Internet Web Site by the Internal Revenue Service on or about July 17, 1996. Included in the material advertised on this page is "The Great Snow Job," which is advertised as being for sale at the price of $14.95. Palmer Decl., ¶ 8.

8. During his investigation, and as a result of his interviews with purchasers of the "De-Taxing America" package, Revenue Agent Palmer secured a copy of the "De-Taxing America" package as well as information concerning the manner in which it is marketed and sold to the public at large. Palmer Decl., ¶ 9.

9. Attached to the Third Declaration of Jeffrey Palmer as Exhibit 5 is a true and correct copy of the "De-Taxing America Program" materials, Volumes I, II and III, which were provided to the Internal Revenue Service by Mary L. Rosado. A redacted copy of Volume I of the "De-Taxing America Program" materials furnished by Mary L. Rosado was attached to the previously-filed Declaration of Jeffrey Palmer as Exhibit 4. Redacted copies of Volumes I and II of the "De-Taxing America Program" materials furnished by Mary L. Rosado are attached as Exhibit F to the transcript of the deposition taken of Robert M. Burmesch in this case, which is attached to the Seventh Declaration of Teresa Dondlinger Trissell. Third Palmer Decl., ¶ 7.

10. As a result of an administrative summons which was issued by Revenue Agent Palmer to the Ozaukee Bank on August 1, 1996, for books, records, papers and other data relating to Robert R. Raymond, Patricia J. Raymond, Morningstar Consultants, De-Taxing America, Raymond Contractors, Bounty Trust and MSM Trust, Revenue Agent Palmer learned that proceeds from the sale of the "De- Taxing America" package were deposited

into a checking account at the Ozaukee Bank in Cedarburg, Wisconsin, which was held in the name of the "Bounty Trust." The checking account for the Bounty Trust was opened on October 4, 1995. This information was gained through an analysis of the items deposited in the Bounty Trust checking account (account # 22677 1), copies of which Revenue Agent Palmer obtained through the IRS summons issued to the Ozaukee Bank. Palmer Decl., TT13 and 14; Third Palmer Decl., ¶¶ 15 and 16.

11. The records maintained by the Ozaukee Bank with respect to the Bounty Trust checking account (# 226771), including the signature card for account # 226771 and periodic account statements for account # 226771, indicate that Robert G. Bernhoft is a trustee of the Bounty Trust, and that Robert Raymond is a managing director of the Bounty Trust. Palmer Decl., T14; Third Palmer Decl., TT8, 16, 18; Exhibits 13T and 13Y to the deposition of Robert G. Bernhoft (Volume 1) under the Second Declaration of Teresa Dondlinger Trissell.

12. Revenue Agent Palmer's analysis of the bank statements and deposits to the Bounty Trust checking account at the Ozaukee Bank for the period between October 4, 1995 (the date the checking account for the "Bounty Trust" was opened) and July 18, 1996, together with oral testimony provided to him by purchasers of the "De-Taxing America" package, document total deposits of $34,578 from sales of the "De-Taxing America" package by Robert R. Raymond, individually and/or doing business as Morningstar Consultants, and Robert G. Bernhoft, individually and/or doing business as Morningstar Consultants. Palmer Decl., ¶ 5; Third Palmer Decl., ¶ 16.

13. From bank records obtained by Revenue Agent Palmer from the Ozaukee Bank in Cedarburg, Wisconsin, the first documented sales of the De-Taxing America

Program by Robert R.Raymond and/or Robert G. Bernhoft occurred in October of 1995. Third Palmer Decl., ¶ 15.

14. One of the first purchasers of the De-Taxing America Program was Donald E. Payne, who testified that he purchased the De-Taxing America Program materials from Robert R. Raymond and Robert G. Bernhoft. Deposition of Donald E. Payne (under Twenty-Third Declaration of Teresa Dondlinger Trissell), Tr. 9:17 to 11:9; Third Palmer Decl., ¶ 16.

15. Attached to the transcript of the deposition of Donald E. Payne (under the Twenty-Third Declaration of Teresa Dondlinger Trissell) as Exhibit 15-B is a copy of the check written by Mr. Payne to the Bounty Trust in the amount of $1,000 on October 27, 1995. Also attached to the deposition transcript as Exhibit 15-B was a copy of a deposit ticket reflecting a $ 1,000 deposit to the account of the Bounty Trust at the Ozaukee Bank on October 31, 1995. Copies of the checks signed by Mr. Payne, dated January 6, 1996 and March 2, 1996, and made payable to the Bounty Trust in the amounts of $395 and $200, respectively, and the deposit tickets for the account of the Bounty Trust at the Ozaukee Bank, dated January 8, 1996 and March 4, 1996, in the amounts of $395 and $200, respectively, are attached to the transcript of the deposition of Mr. Payne as Exhibits 15-C and 15-D. Deposition of Donald E. Payne, Tr. 12:7 to 15:25; Third Palmer Decl., ¶¶ 16 and 17.

16. Revenue Agent Palmer determined, as a result of his investigation, that fifty-five (55) individuals (including the spouses of purchasers) purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft doing business as "Morningstar Consultants." This determination was based upon: (1) Revenue Agent Palmer's examination of the checks written by the

purchasers of the De-Taxing America Program to the "Bounty Trust," "Morningstar Consultants" "Robert G. (or "Bob") Bernhoft" or "Bob Raymond" and deposited to the account of the Bounty Trust (account # 226771) at the Ozaukee Bank between October 4, 1995 and July 18, 1996 (words such as "De-Tax," "D.T.," "De-Taxing" or "De-Tax Information" were frequently written in the memo section of the personal check written by the purchaser); (2) Revenue Agent Palmer's examination of correspondence and written materials mailed to the Internal Revenue Service which bore the name of the purchaser or purchasers, and which was identical or substantially similar to the correspondence and written materials contained in Volumes I and II of the copy of the "De-Taxing America Program" obtained from Mary L. Rosado (as described in paragraph 9, above); and (3) the oral statements or deposition testimony of purchasers of the De- Taxing America Program, including (but not limited to) Rita Greil Behr, Robert M. Bunnesch, Thomas C. Casper, Dane E. Charles, James F. Ciesielski, John P. Clark, Lynn M. Dable, Gary Neil Dailey, Anthony E. Deiss, Charles E. Ergen, Edward Frami, Gerard N. Haas, James Hause, Thomas F. Jelinek, Karen N. Leonard, Barry D. Moder, Elizabeth A. Mueller, Donald E. Payne and Bruce T. Peacock. Third Palmer Decl., ¶¶ 5 and 19.

17. Revenue Agent Palmer's examination of "De-Taxing America" correspondence and forms received by the Internal Revenue Service, as well as items deposited to the Bounty Trust checking account at the Ozaukee Bank (as described above), show that Robert R. Raymond and/or Robert G. Bernhoft, individually and/or doing business as Morningstar Consultants, have sold the "De-Taxing America" package to individual taxpayers residing in the States of Wisconsin, Illinois, Nevada and Nebraska. Palmer Decl., ¶ 16.

18. Revenue Agent Palmer's investigation into the De-Taxing America Program, as described above, indicated that individual purchasers of the Program paid between $445 and approximately $2,600 to Robert R. Raymond and/or Robert G. Bernhoft for their copies of the Program materials. These figures were taken from the copies of the checks that were made payable to the "Bounty Trust," "Morningstar Consultants," "Robert G. (or "Bob") Bernhoft" or "Bob Raymond" and deposited to the account of the Bounty Trust (account # 226771) at the Ozaukee Bank between October 4, 1995 and July 18, 1996. Third Palmer Decl., ¶ 25.

B. Significant features of the De-Taxing of America Program

19. The De-Taxing America Program materials, including Volumes I, II and III which were provided to the Internal Revenue Service by Mary L. Rosado (Exhibit 5 to the Third Declaration of Jeffrey Palmer), and the copies of De-Taxing America Program materials which are attached to the transcripts of the depositions of Robert R. Raymond, Robert G. Bernhoft, Rita Greil Behr, Robert M. Burmesch, Thomas C. Casper, Dane E. Charles, James F. Ciesielski, John P. Clark, Lynn M. Dable, Gary Neil Dailey, Anthony E. Deiss, Charles E. Ergen, Edward Frami, Gerard N. Haas, James Hause, Thomas F. Jelinek, Karen N. Leonard, Barry D. Moder, Elizabeth A. Mueller, Donald E. Payne, Bruce T. Peacock and Daniel J. Treuden, instruct the purchasers of the De-Taxing America Program to submit correspondence and other written materials to the Internal Revenue Service, the U.S. Department of Justice, the State Department of Revenue and the Social Security Administration. Third Palmer Decl., ¶ 22 and Exhibit 5 thereto; Second through Twenty-Fifth Declaration of Teresa Dondlinger Trissell and the Exhibits attached thereto.

20. Based upon his review of the De-Taxing America Program materials described above, his investigation into the "De-Taxing America Program," and his prior years of experience as an Internal Revenue Service Revenue Agent, Revenue Agent Palmer observed that the Program preys on individuals who believe the representations made in Volumes I, II and III of the De-Taxing America Program that an individual who is otherwise obligated to file a federal income tax return and pay federal income and social security taxes can legally cease filing returns and paying taxes by following the advice and utilizing the materials contained in the De-Taxing America Program. Third Palmer Decl., ¶ 23.

21. The De-Taxing America Program portrays itself as being an easy-to- follow, step-by-step program which converts money formerly paid to the United States as federal income and social security taxes into discretionary income. Volume III of the De-Taxing America Program contains copies of reported federal court decisions which supposedly support the instructions and erroneous statements regarding the internal revenue laws contained in Volumes I and II of the Program. Third Palmer Decl., ¶ 24, and Exhibit 5 thereto.

22. Customers who purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft filled out a "Morningstar Consultants Client Questionnaire." Two examples of these Questionnaires are attached to the depositions of Rita Greil Behr (formerly known as Rita Greil) as Exhibit DDDDD (under the Sixth Declaration of Teresa Dondlinger Trissell) and Edward Frami as Exhibit 7-0 (under the Fifteenth Declaration of Teresa Dondlinger Trissell). Third Palmer Decl., ¶ 26.

23. The introductory paragraph of the Morningstar Consultants Client Questionnaire instructs the purchaser of the De-Taxing America Program to "[p]lease print or type your responses exactly as you wish them to appear on your personalized documents." These personalized documents subsequently appear as Documents in Volumes I and II of the De-Taxing America Program. For example, Exhibit EEEEE (attached to the transcript of the deposition of Rita Greil Behr under the Sixth Declaration of Teresa Dondlinger Trissell), entitled "Constructive Notice, Demand, and Statement," bears the same address as that shown on the Morningstar Consultants Client Questionnaire (Exhibit DDDDD). Third Palmer Decl., ¶ 26.

24. The "Instructions" contained in Volume I of the "De-Taxing America Program" instruct the purchaser to send numerous preprinted letters to various Government officials, including the Attorney General of the United States, the District Director of Internal Revenue and the Director of the Social Security Administration. The purchaser is also instructed to sign these letters before a notary public and to send them to the addressees by certified or registered mail. These letters, among other items, "assert that [the purchaser of the De-Taxing America Program is] not within the purview of either Title 26 or Title 27," "make a record that there is no law, code, regulation, or statute that requires you to file a 1040 return," and "demand[ ] proof of the proper delegations of authority and that the IRS prove its jurisdiction over you." The material which appears in quotations is taken from the "Instructions" found in Volume I of the De-Taxing America Program (attached to the Third Declaration of Jeffrey Palmer as Exhibit 5). Third Palmer Decl., ¶ 27, and Exhibit 5 thereto.

25. The De-Taxing America Program instructs purchasers whose employers withhold federal income and social security taxes from their paychecks to prepare and submit to their employers Employee's Withholding Allowance Certificates (Forms W-4) which falsely assert that the purchasers are exempt from the withholding requirements imposed by various provisions of the Internal Revenue Code. Third Palmer Decl., ¶ 28, and Exhibit 5 thereto.

26. Document 11 of Volume I of the De-Taxing America Program consists of a preprinted letter which is addressed to the "Director of Personnel." Several spaces are left for the insertion of the employer's name and address. Document 11 informs the purchaser's employer that Barrie Konicov, the "Founder and Director of De-Taxing America," is assisting the purchaser in "the process of legally removing him/herself from paying federal, state, and Social Security taxes." Included in the documentation which appears as Document 11 is a document entitled "Certificate of Exemption from Withholding in Lieu of W-4" which represents that "[n]o liability for income tax has knowingly been incurred by me under Subtitle A in the past year or in previous years." Third Palmer Decl., ¶ 28, and Exhibit 5 thereto.

27. The "De-Taxing America" package contains many false statements and promotes the use of various schemes to enable purchasers of the "De-Taxing America" package to evade the assessment and payment of federal income and social security taxes. Palmer Decl., ¶ 10.

28. The De-Taxing America Program encourages purchasers of the Program not to file federal income tax returns with the Internal Revenue Service by falsely stating that:

> -- wages and salaries earned by an individual taxpayer are not taxable;

> -- there is no legal requirement for an individual to file a tax return with the Internal Revenue Service;
> -- the filing of federal income tax returns and the payment of federal income taxes by individual taxpayers is completely voluntary and not mandatory; and-- the Internal Revenue Code was never enacted into law.

Palmer Decl., ¶ 11; Third Palmer Decl., ¶ 35, and Exhibit 5 thereto.

29. The De-Taxing America Program, as marketed by Robert R. Raymond and/or Robert G. Bernhoft, also instructs purchasers of the Program to file claims with the Internal Revenue Service for federal income taxes previously paid by the purchasers for the preceding three tax years. The instructions found in Volume I of the De-Taxing America Program (Exhibit 5 to the Third Declaration of Jeffrey Palmer) state, in pertinent part, that "Document 21, the 104OX Form, will allow you to request a federal income tax refund for any (or all) of the last three tax years for which taxes were paid and you did file a 1040 Form." Third Palmer Decl., ¶ 39, and Exhibit 5 thereto.

30. Appended to Document 21 (a blank Amended U.S. Individual Income Tax Return or Form 104OX) of the De-Taxing America Program materials are detailed instructions for completing an Amended U.S. Individual Income Tax Return where the "correct amount" of the income and deductions for the taxpayer are (according to the sample Form 104OX supplied with Document 21) all listed as "0." The amount of the overpayment of federal income tax which purchasers of the De-Taxing America Program are instructed to insert on line 18 of the amended federal income tax return (Form 104OX) is equal

to the tax liability which they reported on their U.S. Individual Income Tax Return (Form 1040) which was filed with the Internal Revenue Service for one of the preceding three tax years. The "amount you owe," as reflected on line 20 of the amended federal income tax return (as completed by the purchasers of the Program) is always "0." Third Palmer Decl., ¶ 39.

31. Purchasers of the "De-Taxing America" package are also instructed to submit requests for information under the Freedom of Information Act (FOIA) to the Internal Revenue Service. Palmer Decl., ¶ 12.

C. Consequences of the defendants' sales of the De-Taxing of America Program

1. Filing false withholding certificates

31. (sic) As noted above, the De-Taxing America Program instructs its purchasers whose employers withhold federal income taxes from their salary or wages to file Employee's Withholding Allowance Certificates with those employers to falsely claim that the purchasers are exempt from the withholding requirements of the federal employment tax laws. At least 12 individuals who purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft requested that their employers cease withholding federal income taxes from their wages. Third Palmer Decl., ¶¶ 28 and 29.

32. Examples of the Employee's Withholding Allowance Certificates (Forms W-4) described in the preceding paragraphs include the Form W-4 submitted by Robert M. Burmesch to his employer in December of 1995. A true and correct copy of this Form W-4 is attached as Exhibit H to the transcript of the deposition of Robert M. Burmesch (under the Seventh Declaration of Teresa

Dondlinger Trissell). Exhibit G to the deposition of Robert M. Burmesch, entitled "Certificate of Exemption from Withholding in Lieu of W-4," is identical to the "Certificate of Exemption from Withholding in Lieu of W-4" described in paragraph 28 of the Third Declaration of Jeffrey Palmer, and paragraph 26, above. Third Palmer Decl., ¶ 30.

33. Other examples of purchasers of the De-Taxing America Program who submitted Employee's Withholding Allowance Certificates (Forms W-4) or "Certificates of Exemption from Withholding in Lieu of W-4" (as described in paragraph 28 of the Declaration of Jeffrey Palmer and paragraph 26, above) to their employers which incorrectly stated that they were "exempt" from the withholding requirements of the Internal Revenue Code include:

A. Linda-K.-Clark (the wife of John P. Clark) who submitted a Form W-4 on or about November 16, 1995 (Exhibit 18-1 to the transcript of the deposition of John P. Clark under the Tenth Declaration of Teresa Dondlinger Trissell);

B. John W. Dable and Lynn M. Dable who submitted "Certificates of Exemption from Withholding in Lieu of W-4" to their employers on or about February 5, 1996 and February 7, 1996, respectively (Exhibit HHHH to the transcript of the deposition of Lynn M. Dable under the Eleventh Declaration of Teresa Dondlinger Trissell);

C. Gary N. Dailey who submitted a "Certificate of Exemption from Withholding in Lieu of W-4" to his employer on or about January 3, 1996 (Exhibit CCC to the transcript of the deposition of Gary N.

> Dailey under the Twelfth Declaration of Teresa Dondlinger Trissell);
> D. Anthony E. Deiss, who submitted a Form W-4 to his employer on or about August 14, 1995 (Exhibit ZZZZZ to the transcript of the deposition of Anthony E. Deiss under the Thirteenth Declaration of Teresa Dondlinger Trissell); and
> E. Daniel J. Trueden, who submitted a "Certificate of Exemption from Withholding in Lieu of W-4" to his employer on or about October 30, 1995 (Exhibit I 1 -T to the transcript of the deposition of Daniel J. Treuden under the Twenty-Fifth Declaration of Teresa Dondlinger Trissell).

Third Palmer Decl., ¶ 31.

34. The filing of the Forms W-4 and "Certificates of Exemption from Withholding in Lieu of W-4" by purchasers of the De-Taxing America Program, as described above, required an employee of the Internal Revenue Service to contact the purchaser's employer and instruct the employer not to honor the Form W-4 or "Certificate of Exemption from Withholding in Lieu of W-4" which asserted that the purchaser was somehow exempt from the withholding requirements imposed by the Internal Revenue Code. Third Palmer Decl., ¶ 32.

35. As the Tax Protestor Coordinator for the Internal Revenue Service in Wisconsin, Revenue Agent Palmer contacted several of the employers of individuals who purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft and who submitted Forms W-4 to their employers which falsely or fraudulently claimed (in accordance with the instructions and documents contained in the De-Taxing America

Program) that they were exempt from the requirements to have federal income taxes withheld from their wages or salaries, and notified those employers that they should continue to withhold federal income taxes from the wages or salaries of the purchasers of the De- Taxing America Program. Third Palmer Decl., ¶ 32.

36. Under Section 6682 of the Internal Revenue Code, a $500 civil penalty may be assessed against an individual who makes a statement under Section 3402 of the Internal Revenue Code (relating to income tax collected at the source) which results in a lesser amount of income tax actually deducted and withheld than is properly allowable under Section 3402 when there was no reasonable basis for the statement at the time it was made. Section 6682 civil penalties were assessed against a number of purchasers of the De-Taxing America Program who submitted Employee's Withholding Allowance Certificates (Forms W-4) to their employers which falsely claimed that the purchasers were exempt from the requirements to withhold federal income taxes from their wages or salaries. Third Palmer Decl., ¶ 33.

37. As a result of the filing of the "Certificates of Exemption from Withholding in Lieu of W-4" contained in the De-Taxing America Program, and the Forms W-4 which falsely asserted that purchasers of the De-Taxing America Program were exempt from the federal withholding requirements, the Internal Revenue Service was administratively burdened and required to utilize its employees to ensure that federal income taxes were properly withheld from the wages and salaries received by those purchasers. Third Palmer Decl., ¶ 34.

2. Failure to file tax returns and pay taxes

38. Records maintained by the Internal Revenue Service reflect that at least 20 individuals and/or their spouses who filed income tax returns for the 1994 taxable year and/or prior years, and who subsequently purchased the De-Taxing America Program, failed to file federal income tax returns with the Internal Revenue Service for the 1995, 1996 or 1997 taxable years. Third Palmer Decl., ¶ 36.

39. Based upon the income reported by some of these individuals (i.e., those who failed to file federal income tax returns for the 1995-1997 tax years) on the income tax returns which they had previously filed with the Internal Revenue Service, as well as income actually received by some of these individuals (as reported to the Internal Revenue Service) and Bureau of Labor statistics. Revenue Agent Palmer estimated that the United States has suffered a loss of federal income tax revenue in the amount of $691,731.00 as a result of the failure of certain purchasers of the De-Taxing America Program to file federal income tax returns with the Internal Revenue Service. Third Palmer Declaration, ¶ 36.

40. Revenue Agent Palmer's calculation of the federal income tax revenues lost by the United States takes into consideration the federal income taxes actually withheld and the estimated taxes paid to the Internal Revenue Service for the 1995, 1996 and 1997 taxable years, if any, with respect to the 20 individuals described in paragraph 36 of the Third Declaration of Jeffrey Palmer and paragraphs 38 and 39, above. Third Palmer Decl., ¶ 36.

41. The tax revenues lost by the United States as result of the failure of the 20 individuals and/or their spouses to file federal income tax returns and pay federal

income taxes for the 1995-1997 tax years are further aggravated by the administrative expense incurred by the IRS in undertaking taxpayer delinquency investigations (TDIs) by attempting to contact the delinquent taxpayers and secure the unfiled federal income tax returns. Third Palmer Decl., ¶ 37.

42. The Internal Revenue Service has commenced fifteen (15) taxpayer delinquency investigations with respect to 11 individuals who purchased the De- Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft, or whose spouse purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft. Third Palmer Decl., ¶ 37.

43. If the federal income tax returns cannot be obtained voluntarily from the individual through the taxpayer delinquency investigations, the Internal Revenue Service is obliged to examine or audit the individual's federal income tax liabilities to determine whether an income tax deficiency exists unless circumstances warrant otherwise. Third Palmer Decl., ¶ 38.

44. After the audit or examination of the non-filer's federal income tax liability is completed, the Internal Revenue Service is then required to send the delinquent taxpayer a notice of deficiency as to his or her federal income tax liability if an audit deficiency is determined against the taxpayer. If an audit or income tax deficiency is subsequently assessed against the taxpayer, and the taxpayer refuses to voluntarily pay the assessed tax liability, the IRS is then obliged to undertake enforced collection action to collect the amount of the outstanding federal tax liabilities, or taxpayer delinquent accounts (TDAs). Third Palmer Decl., ¶ 38.

3. Filing fraudulent tax refund claims

45. The Internal Revenue Service has received, from purchasers of the "De-Taxing America" package, amended federal income tax returns (Forms 104OX) which request refunds of all or a portion of the federal income taxes paid by the taxpayer for taxable years prior to 1995. Palmer Decl., ¶ 22; Third Palmer Decl., ¶ 40.

46. Certain individuals who purchased the De-Taxing America Program from Robert R. Raymond and/or Robert G. Bernhoft filed amended federal income tax returns (Forms 104OX) with the Internal Revenue Service. Third Palmer Decl., ¶ 40.

47. Anthony E. Deiss (and his spouse, Lisa L. Deiss) filed an amended federal income tax return (Form 104OX) with the Internal Revenue Service for the 1992 taxable year which identified their income as "0," and which requested a refund of $1,744. A true and correct copy of this 1992 Form 104OX is attached to the transcript of the deposition of Anthony E. Deiss as Exhibit 6- K (under the Thirteenth Declaration of Teresa Dondlinger Trissell). Third Palmer Decl., ¶ 40.

48. On February 12, 1996, a Treasury check in the amount of $2,138.60 was issued to Mr. and Mrs. Deiss, representing the requested 1992 tax refund of $1,744 plus statutory interest. When the Internal Revenue Service subsequently notified Mr. and Mrs. Deiss that the refund of $2,138.60 for his 1992 federal income tax liability was erroneous, Mr. Deiss wrote "Acceptance Refused for Cause Without Dishonor" "UCC 3-501" across the notice of erroneous refund on May 29, 1996, and returned it to the Internal Revenue Service (as evidenced by Exhibit 6-F attached to the transcript of the deposition of Anthony E.

Deiss under the Thirteenth Declaration of Teresa Dondlinger Trissell). Third Palmer Decl., ¶ 40.

Anthony and Lisa Deiss paid back the $2,138.60 they received via refund, with penalties and interest.(See June 26, 1997 Depo. of Anthony Deiss, 25:9-15 under Thirteenth Declaration of Teresa Dondlinger Trissell).

4. Filing frivolous FOIA/Privacy Act requests

49. Numerous requests for information were made by purchasers of the De-Taxing America Program utilizing pre-printed "Request[s] for Information under the Privacy Act and the Freedom of Information Act." Second Declaration of Fred G. Damaske ("Second Damaske Decl."), ¶¶ 1 and 6.

50. These "Request[s] for Information under the Privacy Act and the Freedom of Information Act," in numerous cases, were addressed to the Disclosure Officer, Internal Revenue Service-Milwaukee District, 310 W. Wisconsin, Milwaukee, WI 53203. Such requests for information under the FOIA were routinely forwarded by the Internal Revenue Service to the office of the Disclosure Officer, Fred G. Damaske, for response. Second Damaske Decl., ¶¶ 1 and 6.

51. Between August 7, 1995 and January 21, 1997, the defendant, Robert G. Bernhoft, made eighteen (18) requests for information under the Freedom of Information Act and/or the Privacy Act. Third Palmer Decl., ¶ 19.

52. In a "FOIA and Privacy Act Request for a 'Letter Ruling'" dated December 12, 1995 to the Assistant Commissioner of Internal Revenue in Washington, D.C., the defendant, Robert G. Bernhoft, and his spouse requested a "'letter ruling' with respect to defining our

status for tax purposes prior to filing a tax return." More specifically, the defendant and his wife requested that they be provided with a letter ruling "that we are not ... 'taxpayers' as defined in 26 U.S.C.... 7701(a)(14)," and further requested that they be provided with a written statement in response to their question "What specific tax law or published regulation requires us to file a Form 1040?" Exhibit 14E to the transcript of the deposition of Robert G. Bernhoft (Volume 2) under the Third Declaration of Teresa Dondlinger Trissell; Third Palmer Decl., ¶ 19.

53. As a result of the dissemination of the De-Taxing America Program materials, the Internal Revenue Service was administratively burdened and required to devote substantial personnel resources to responding to the FOIA and/or Privacy Act requests made by purchasers of the Program. Second Damaske Decl., ¶ 7.

54. From 1995 through the date of this Declaration, the technical staff of the Disclosure Office (which works under the supervision of Fred G. Damaske) has been required to spend approximately 291.5 hours responding to over 124 FOIA and Privacy Act requests at a total cost of $6,179.80 to the Internal Revenue Service, based upon the salaries of two disclosure specialists at $21.20 per hour. Second Damaske Decl., ¶ 7.

5. <u>Administrative burdens to IRS</u>

55. In addition to the tax revenues which the United States lost as a result of the De-Taxing America Program (either by way of the purchaser's refusal to file income tax returns and pay taxes, or through erroneous tax refunds made to purchasers who submitted false amended federal income tax returns), the Internal Revenue Service incurred costs in terms of the administrative resource

devoted by the agency to resolving the problems created by the sales and uses of the De-Taxing America Program. Third Palmer Decl., ¶ 41.

56. As part of Revenue Agent Palmer's investigation into the organization and marketing of the De-Taxing America Program by Robert R. Raymond and/or Robert G. Bernhoft, he estimated that a total of 507 hours had been spent by various Internal Revenue Service personnel in performing functions such as:

> (a) auditing the federal income tax liabilities of purchasers of the De-Taxing America Program;
>
> (b) preparing substitutes for return (SFRs) for purchasers of the De-Taxing America Program who failed to file income tax returns with the Internal Revenue Service for the 1995-1997 taxable years;
>
> (c) preparing, reviewing and issuing statutory notices of deficiency to purchasers of the De-Taxing America Program;
>
> (d) responding to Forms W-4 filed by purchasers of the De-Taxing America Program who claimed that they were exempt from the federal withholding requirements, including proposing and assessing Section 6682 civil penalties;
>
> (e) responding to Freedom of Information Act (FOIA) and Privacy Act requests sent to the Internal Revenue Service by purchasers of the De-Taxing America Program;
>
> (f) issuing pre-filing notification and warning letters to purchasers of the De-Taxing America Program; and

(g) collecting delinquent federal income taxes and statutory additions to tax from purchasers of the De-Taxing America program. Third Palmer Decl., ¶ 41.

57. The 507 hours spent by Internal Revenue Service personnel in performing the above-described functions does not include the additional time spent by IRS personnel in performing similar functions with respect to the activities of purchasers of the De-Taxing America Program since January of 1997. Third Palmer Decl., ¶ 41.

D. Actual uses made of the "De-Taxing America Program" by its purchasers

58. ***Rita Greil Behr*** (formerly Rita Greil) purchased the "De-Taxing America Program" through the defendant. Robert Raymond, by delivering to him a check made out to "Robert Raymond" in the amount of $1,000.00. Deposition of Rita Greil Behr ("Behr Dep."), Tr. 5:4-19; 10:7 to 11:3; 16:3 to 17:12, under the Sixth Declaration of Teresa Dondlinger Trissell, and Exhibit AAAAA thereto. At the request of Mr. Raymond, she filled out the "Morningstar Consultants Client Questionnaire" attached to her deposition as Exhibit DDDDD. Behr Dep., Tr. 21:4 to 22:23. Although she was born in Wisconsin, graduated from a high school located in Wisconsin, and had worked as a nurse anesthetist for the past 15 years, Ms. Behr signed and sent to the District Director of Internal Revenue in Milwaukee, Wisconsin a document entitled "Constructive Notice, Demand, and Statement" in which she stated that she had received legal advice that she was not liable for, or subject to, income taxes. Behr Dep., Tr. 7:14-21; 8:1- 10; 15:1-20; 23:19-25; 24:24 to 26:3, and Exhibit EEEEE thereto. Ms. Behr also signed and mailed to the IRS other materials from the "De-Taxing America

Program" which are marked as Exhibits FFFFF through JJJJJ to her deposition. Behr Dep., Tr. 26:4 to 30:7.

59. ***Robert M. Burmesch*** is a steel worker in Saukville, Wisconsin who purchased the De-Taxing America Program materials for $1,500.00 through Robert Raymond, who was known by Mr. Burmesch (along with Robert G. Bernhoft) to be associated with Morningstar Consultants. Deposition of Robert M. Burmesch ("Burmesch Dep."), Tr. 6:19 to 7:11; 8:16 to 10:8; 17:21 to 18:8 under the Seventh Declaration of Teresa Dondlinger Trissell. Mr. Burmesch made out two checks (each for $500) to "Morningstar Consultants" for the De-Taxing America Program. Burmesch Dep., Tr. 21:7 to 22:14; 25:4-18; 26:6 to 27:20, and Exhibit F thereto. Utilizing the "Certificate of Exemption from Withholding in Lieu of W-4 Form" and an "Employee's Withholding Allowance Certificate" (Form W-4) which he obtained from the "De-Taxing America Program" materials, Mr. Burmesch attempted to have his employer, Charter Steel, stop withholding federal income taxes from his paychecks. Burmesch Dep., Tr. 32:24 to 34:23; 36:7-12, and Exhibits G and H thereto. Charter Steel initially honored Mr. Burmesch's claim that he was exempt from withholding, but later withheld federal income taxes after being instructed to do so by Revenue Agent Palmer. Burmesch Dep., Tr. 7:14-22.

60. After Mr. Burmesch was assessed a $500 penalty under Section 6682 of the Internal Revenue Code, Mr. Raymond advised him to write "Acceptance Refused for Cause Without Dishonor UCC 3-501 March 18, 1996 sign: Robert M. Burmesch" on the penalty notice. Burmesch Dep., Tr. 37:22 to 38:23, and Exhibit K thereto. Mr. Burmesch also sent the "Constructive Notice, Demand, and Statement" document from the De-Taxing America Program materials to the IRS District Director in

Milwaukee, Wisconsin. Burmesch Dep., Tr. 41:13 to 42:9, and Exhibit N thereto. Mr. Burmesch sent a letter to the Director of the Foreign Operations District of the Internal Revenue Service in which he claimed that he was a "non-resident alien," and a separate letter to the IRS District Director in Milwaukee, Wisconsin, where he stated that he was not a "taxpayer," or an "individual" who was required to file a tax return. Burmesch Dep., Tr. 42:10 to 43:6, and Exhibits P and Q thereto. Lastly, Mr. Burmesch also sent two Freedom of Information Act requests to the Internal Revenue Service, and one to the Attorney General of the United States from the De-Taxing America Program. Burmesch Dep., Tr. 43:10 to 45:14, and Exhibits R, S and T thereto.

61. *Thomas C. Casper* is an unemployed worker with a temporary parcel delivery job from Racine, Wisconsin, who purchased the De-Taxing America Program for $1,250 through Robert R. Raymond. Deposition of Thomas C. Casper ("Casper Dep."), Tr. 4:7-12; 6:10-24; 11:19 to 12:16; 13:10 to 15:13; 19:9 to 21:25, under the Eighth Declaration of Teresa Dondlinger Trissell. Mr. Casper sent the "Constructive Notice, Demand, and Statement" document from the De-Taxing America Program materials to the IRS District Director in Milwaukee, Wisconsin. Casper Dep., Tr. 33:11 to 34:17, 35:22 to 36:3, and Exhibit AA thereto. Mr. Casper also sent also sent three Freedom of Information Act requests to the Internal Revenue Service, and one to the Attorney General of the United States from the De-Taxing America Program. Casper Dep., Tr. 36:16 to 39:2, and Exhibits EE, FF, GG and HH thereto. Mr. Casper testified that he had not filed a federal income tax return for the 1995 and 1996 tax years. Casper Dep., Tr. 40:17-22.

62. *Dane E. Charles* is an intrastate commercial driver who lives in Neenah, Wisconsin, and who originally learned about the De-Taxing America Program from Robert R. Raymond. Deposition of Dane E. Charles ("Charles Dep."), Tr. 3:7- 16; 4:1-6; 8:4-14, under the Eighth Declaration of Teresa Dondlinger Trissell. Mr. Charles recognized the name "Morningstar Consultants," and associated the defendants, Robert Raymond and Robert Bernhoft, with Morningstar Consultants. Charles Dep., Tr. 5:22 to 6:18. Mr. Charles attended meetings held by Morningstar Consultants at the home of Robert Raymond, and purchased the De-Taxing America Program for $ 1,000 by giving two checks made out to "Bounty Trust" to Robert Raymond. Charles Dep., Tr. 8:22 to 10:12.11:12 to 12:16, 19:20 to 22:12, and Exhibits 7L and 7M thereto. Mr. Charles testified that he had not filed a federal income tax return (Form 1040) with the Internal Revenue Service for the 1995 and 1996 tax years. Charles Dep., Tr. 14:3-21. When asked why he had not filed a tax return for 1995 and 1996. Mr. Charles answered "Because of the information I've been gathering," which included the De-Taxing America Program. Charles Dep., Tr. 16:22 to 17:5.

Dane Charles made a decision to not file the IRS Form 1040 before ever receiving any "De-Taxing America Program" materials, and never sent any correspondence to the IRS as a result of his purchase of the "De-Taxing America Program". Charles filed an "exempt" Form W-4, but that filing had no relation to the materials he purchased from the defendants.(See June 24, 1997 Depo. of Charles, Tr. 13:1-13, 14:8-17 under the Eighth Declaration of Teresa Dondlinger Trissell).

63. *James F. Ciesielski* is an engineer for the Milwaukee Metropolitan Sewage District who lives in Greenfield, Wisconsin. Deposition of James F. Ciesielski

("Ciesielski Dep."), Tr. 4:7-13; 5:10-12; 8:3-9, under the Ninth Declaration of Teresa Dondlinger Trissell. Mr. Ciesielski is familiar with Morningstar Consultants as "an information firm that provides information on correspondence with various entities of the government." Ciesielski Dep., Tr. 8:24 to 9:5. Mr. Ciesielski dealt with Robert Raymond and Robert Bemhoft on behalf of Morningstar Consultants. Ciesielski Dep., Tr. 9:6-10. Mr. Ciesielski made out a check for $ 1,000 to the "Bounty Trust" in January of 1996. Ciesielski Dep., Tr. 11:14 to 12:8, 14:6 to 15:12, and Exhibit KK thereto. In return, he received three "binders of materials" from Morningstar Consultants which were similar to volumes I and 11 of the De-Taxing America Program materials (Exhibit F to the Deposition of Robert Burmesch). Ciesielski Dep., Tr. 15:15 to 16:16. Mr. Ciesielski testified that Raymond and Bernhoft told him that they believed that individuals are not required to file income tax returns or pay federal taxes. Ciesielski Dep., Tr. 22:2-9.

(In their responses to this particular proposed finding the defendants present that they "told Ciesielski that they believed that 'many' individuals were not required by law to file the IRS Form 1040 Individual Income Tax Return to pay the 26 U.S.C. § 1.1-1 individual income tax, not that all people were not required to file." However, the documentary support which they cite for such distinction in what they allegedly said does not, in fact, support their version of what they said to Ciesielski. In fact the declarations which they cite do not say anything about what they did or did not say to Ciesielski.)

64. On or about July 31, 1996, Mr. Ciesielski sent a document entitled "Constructive Notice, Demand, and Statement" to the District Director of Internal Revenue in Milwaukee, Wisconsin. Ciesielski Dep., Tr. 27:21 to 29:19, and Exhibit 00 thereto. He sent a letter to the

District Director of Internal Revenue in Milwaukee, Wisconsin, from the materials which he received from Morningstar Consultants in which he stated that "[i]t is my contention that I am not required to file an individual income tax return because I have not been provided with the law that requires me to do so." Ciesielski Dep., Tr. 31:10 to 32:2, and Exhibit PP thereto. He also sent a "Request for Information Under the Privacy Act and the Freedom of Information Act" from the materials he received from Morningstar Consultants to the District Director of Internal Revenue in Milwaukee, Wisconsin. Ciesielski Dep., Tr. 35:2-16, and Exhibit TT thereto.

65. *John W. Dable and Lynn M. Dable* are husband and wife and reside in Milwaukee, where Mr. Dable is a sales manager for Circuit City and Mrs. Dable is a school teacher. Deposition of John W. and Lynn M. Dable ("Dable Dep."), Tr. 4:6-20; 5:9-23; 6:2 to 7:11, under the Eleventh Declaration of Teresa Dondlinger Trissell. Mr. Dable signed checks payable to the "Bounty Trust" for $400 and $500 on January 3, 1996 and December 26, 1995, respectively, at the direction of Robert Raymond. Dable Dep., Tr. 14:13 to 16:24; 17:12-23, and Exhibits FFFF and GGGG thereto. In return for these payments, the Dables received three binders of information from Robert Raymond, which Mr. Dable testified was similar to volumes I and II of the De-Taxing America Program (Exhibit F to the Deposition of Robert Burmesch). Dable Dep., Tr. 21:10 to 22:13; 23:18 to 24:9. Both John and Lynn Dable sent. "Notices to Cease Withholding of FICA Taxes" to their respective employers. Dable Dep., Tr. 28:21 to 33:5, and Exhibit HHHH thereto. Each of the Dables also signed a "Certificate of Exemption from Withholding in Lieu of W-4" which they obtained from the De-Taxing America Program materials. Dable Dep., Tr. 36:12 to 37:3; 40:1 to 41:23, and Exhibits KKKK, LLLL and MMMM thereto.

66. A $500 penalty was subsequently assessed against John W. Dable under Section 6682 of the Internal Revenue Code for filing a false Employee's Withholding Allowance Certificate (Form W-4). Dable Dep., Tr. 42:8 to 43:18, and Exhibit 0000 thereto. The Section 6682 penalty was collected from the Dables' 1996 federal income tax refund. Dable Dep., Tr. 43:2-18. The Dables responded to the penalty assessment by sending a letter dated February 27, 1996 to Revenue Agent Jeffrey Palmer of the Internal Revenue Service, and by mailing a "Final Declaration--Notice of Intention to Levy Refused for Cause Without Dishonor" to the Internal Revenue Service on or about July 2, 1996. Dable Dep., Tr. 41:19 to 45:22; 47:8-14; 48:13 to 50:19, and Exhibits NNNN and 0000 thereto. The Dables also sent the "Constructive Notice, Demand, and Statement" document to the IRS District Director in Milwaukee, Wisconsin, and made three separate requests for information under the Freedom of Information Act to the Internal Revenue Service. Dable Dep., Tr. 50:20 to 51:12; 59:11- 22, and Exhibits RRRR, SSSS, and XXY-X thereto.

67. *Gary Neil Dailey.* Mr. Dailey paid a total of $1,000 to the "Bounty Trust" by checks dated December 8, 1995 and December 23, 1995. Deposition of Gary N. Dailey ("Dailey Dep."), Tr. 13:11 to 16:6, and Exhibits XX and ZZ. Dailey send a "Notice to Cease Withholding of FICA Taxes" to his employer, Weldall Manufacturing, Inc., as well as a "Certificate of Exemption from Withholding in Lieu of W-4." Dailey Dep., Tr. 20:9 to 24:1, and Exhibits BBB and CCC thereto. By letter dated August 5, 1996, Mr. Dailey protested the action taken by the Internal Revenue Service to instruct his employer to resume withholding federal income taxes from his wages. Included in this correspondence was a copy of the IRS Notice of Penalty Charge dated March 25, 1996, reflecting

the assessment of a $500 penalty under Section 6682 of the Internal Revenue Code. Dailey Dep., Exhibit EEE.

68. Mr. Dailey was also assessed a $500 civil penalty under Section 6702 of the Internal Revenue Code for filing a frivolous tax return, i.e., a U.S. Individual Income Tax Return (Form 1040) which stated that the $50,205 which he earned from Weldall Manufacturing, Inc., (as evidenced by the attached Form W-2 Wage and Tax Statement) was "non-taxable compensation," and requested that the $4,337 in federal income taxes withheld from his wages be refunded to him. Dailey Dep., Exhibit GGG, MMM. Mr. Dailey also filed an amended U.S. Individual Income Tax Return (Form 104OX) with the IRS for the 1992 taxable year in which the total income and tax were given as "O." Dailey Dep., Exhibit NNN.

E. Defendants' response to the IRS investigation into the De-Taxing America Program

69. On November 15, 1996, Revenue Agent Palmer wrote letters to Robert R. Raymond and Robert G. Bernhoft to advise them that the Internal Revenue Service had completed its preliminary investigation into the De-Taxing America Program, and that the Internal Revenue Service had concluded that penalties, an injunction proceeding, and/or the issuance of pre-filing notification letters to the purchasers of the De-Taxing America Program may be appropriate. Third Palmer Decl., ¶ 43.

70. Mr. Raymond and Mr. Bernhoft were invited to attend a meeting with Revenue Agent Palmer and Revenue Agent Michael Gibson in order to provide the Internal Revenue--Service with facts or legal arguments as to why the proposed actions described above should not be taken. True and correct copies of these November 15,

1996 letters, and the responses received from Robert R. Raymond and Robert G. Bernhoft (their "Affidavits Refusing to Accept the Request for a Meeting to Give Testimony for Cause Without Dishonor") are attached to the Third Declaration of Jeffrey Palmer as Exhibits 7, 8, 9 and 10. Third Palmer Decl., ¶ 43.

71. Based upon his examination of the "De-Taxing America" package and promotion, Revenue Agent Palmer concluded that the "De-Taxing America" package and promotion constitutes an abusive tax shelter within the meaning of Section 6700 of the Internal Revenue Code (26 U.S.C.), and accordingly recommended that a civil action be filed to obtain an injunction prohibiting Robert R. Raymond and Robert G. Bernhoft from continuing to sell the "De-Taxing America" package and promotion. Palmer Decl., ¶ 23.

IV. ANALYSIS

A. SUMMARY JUDGMENT

A district court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P.

The purpose of summary judgment is to "pierce the pleading and to assess the proof in order to see whether there is a genuine issue for trial." **Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.**, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The standard governing summary judgment is clear: if no rational jury could, on the evidence presented in the summary judgment proceeding, bring in a verdict for the party opposing summary judgment ... then summary judgment

must be granted." **Mills v. First Federal Sav. & Loan Ass'n of Belvidere**, 83 F.3d 833, 846 (7th Cir.1996).

"A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A party opposing a properly supported summary judgment motion "may not rest upon mere allegations or denials" but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed.R.Civ.P. "To state it differently, a party will be successful in opposing a summary judgment motion only when they present definite, competent evidence to rebut the motion." **Smith on Behalf of Smith v. Severn**, 129 F.3d 419, 426 (7th Cir.1997).

The court must review the record and "extract all reasonable inferences from it in the light most favorable to the nonmoving party." **Potts v. City of Lafayette, Ind.**, 121 F.3d 1106, 1110 (7th Cir.1997). However, neither "the mere existence of some alleged factual dispute between the parties," **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), nor the demonstration of "some metaphysical doubt as to the material facts," **Matsushita Elec.**, 475 U.S. at 586, 106 S.Ct. 1348, will sufficiently demonstrate a genuine issue of material fact.

Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." **Celotex**, 477 U.S. at 322, 106 S.Ct. 2548.

B. THE INTERPLAY BETWEEN THE VARIOUS STATUTES THAT ARE INVOLVED IN THE PLAINTIFF'S PRAYER FOR RELIEF

Section 7408(a) of the Internal Revenue Code provides that the United States may commence an action in a district court to enjoin any person from engaging in conduct subject to penalty under Sections 6700 and 6701 of the Code. A district court has authority to grant such relief, if it finds: "(1) that the person has engaged in any conduct subject to penalty under section 6700... or section 6701..., and (2) that injunctive relief is appropriate to prevent recurrence of such conduct..." 26 U.S.C. § 7408(b). In turn, 26 U.S.C. § 6700 provides a penalty for false or fraudulent statements by those who organize, promote or sell "a partnership or other entity", "an investment plan or arrangement", or "any other plan or arrangement." Any person who makes or furnishes a statement about the tax consequences of participating in such plan or arrangement which he knows, or has reason to know, is false or fraudulent has engaged in conduct subject to a monetary penalty under Section 6700(a)(2)(A). **United States v. White**, 769 F.2d 511, 514-15 (8th Cir.1985); **United States v. Buttorff**, 761 F.2d 1056, 1059-63 (5th Cir.1985).

Thus, in order for its motion for summary judgment to be granted and for the prayed for injunction to be entered, the United States must show that there are no material issues of fact in dispute and that (1) the defendants engaged in conduct subject to penalty under Section 6700 by making false and fraudulent statements

about the federal tax laws which they knew or should have known to be false and (2) that injunctive relief is warranted to prevent such conduct from continuing.

The United States bears the burden of proving each element of a violation of Section 6700 necessary for the issuance of an injunction under Section 7408 by a preponderance of the evidence. **United States v. H & L Schwartz, Inc.**, 1987 WL 45223, *6 (C.D.Cal.1987). The United States is required to show:

(1) That the defendants in this case have organized or sold (or assisted in the organization or sale of) an entity, plan or arrangement;

(2) That the defendants made or furnished statements concerning tax benefits to be derived from the entity, plan or arrangement;

(3) That the defendants knew, or had reason to know, the statements were false or fraudulent; and

(4) That the false or fraudulent statements pertained to a material matter.

United States v. Campbell, 897 F.2d 1317, 1320 (5th Cir.1990); **United States v. Kaun**, 827 F.2d 1144, 1149 (7th Cir.1987) ("Under § 6700, the government must prove that the defendant was involved in an 'abusive tax shelter': that is, any entity whose principal purpose is the avoidance or evasion of federal income tax.").

Additionally, in support of its claim for relief the United States relies on Section 7402(a) of the Internal Revenue Code, 26 U.S.C. § 7402(a). That section gives district courts "jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." It was intended to provide the district courts with a full range of

powerful tools to ensure the enforcement of both the spirit and the letter of the internal revenue laws. **Brody v. United States**, 243 F.2d 378, 384 (1st Cir.), cert. denied, 354 U.S. 923, 77 S.Ct. 1384, 1 L.Ed.2d 1438 (1957), "[i]t would be difficult to find language more clearly manifesting a congressional intention to provide the district court with a full arsenal of powers to compel compliance under the internal revenue laws." Thus, injunctions have been issued pursuant to Section 7402(a) to enjoin an individual's harassment of Internal Revenue agents, **United States v. Ekblad**, 732 F.2d 562 (7th Cir.1984), to enjoin the promotion and sale of tax evasion trust plans, **United States v. Landsberger**, 692 F.2d 501 (8th Cir.1982), and to enjoin the dissemination of tax protester materials encouraging taxpayers to file improper tax returns. **United States v. Shugarman**, 596 F.Supp. 186 (E.D.Va.1984); **United States v. May**, 555 F.Supp. 1008 (E.D.Mich.1983).

C. THIS ACTION FOR INJUNCTIVE RELIEF UNDER SECTION 7408 OF THE INTERNAL REVENUE CODE WAS PROPERLY COMMENCED

On April 14, 1997, the defendants filed motions to dismiss this case based on lack of subject matter jurisdiction. One of the grounds for defendants' motions was that proper authorization from the Secretary of the Treasury to commence this litigation had not been obtained. Specifically, the defendants argued that the action was being pursued pursuant to the provisions of 26 U.S.C. § 7401 which provides that: "[n]o civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced." In rejecting the defendants' arguments, I determined that the relief sought by the plaintiff was

injunctive, and that the action was not one brought for the collection or recovery of taxes, or of any fine, penalty, or forfeiture. Thus, only Section 7408 authorization was necessary for the action to have been properly commenced. Section 7408 provides that: "[a] civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700... or section 6701... may be commenced at the request of the Secretary." And because I found that proper authorization under section 7408 had been obtained, I recommended that the defendants' motion to dismiss be denied. That recommendation was adopted by the district judge.

The record is clear that the present civil action for an injunction was brought at the request of a proper delegate of the Secretary of the Treasury. The Declaration of Edward G. Langer establishes that the Chief Counsel of the Internal Revenue Service (through his delegate, Assistant Counsel Attorney Langer) authorized and requested the Attorney General to bring an and action for an injunction against the defendants by letter dated January 28, 1997. This January 28, 1997 letter was addressed to Assistant Attorney General Loretta C. Argrett of the Tax Division, a delegate of the Attorney General of the United States.

In any event, this particular issue has been decided against the defendants. It is the "law of the case". **United States v. Mazak**, 789 F.2d 580, 581 (7th Cir.1986) ("[w]e shall not reexamine our original decision, but shall follow it as having established the law of the case.") And, as the plaintiff observes in its brief, it would be impossible for a court to perform its duties satisfactorily, efficiently and expeditiously if a question, once considered and decided, were to be litigated again and

again in the same case. **Creek v. Village of Westhaven**, 144 F.3d 441, 446 (7th Cir.1998).

Thus, to the extent that the defendants combat the plaintiff's motion for summary judgment on the grounds that this lawsuit was not properly authorized, such argument must be rejected.

D. THE "DE-TAXING AMERICA PROGRAM" IS AN ABUSIVE TAX SHELTER WITHIN THE MEANING OF SECTION 6700, THEREBY MAKING ITS FURTHER SALES SUBJECT TO BEING ENJOINED UNDER SECTION 7408 OF THE INTERNAL REVENUE CODE

The defendants argue that the "De-Taxing America Program" is not a plan, arrangement, or entity. Rather, it is a collection of educational information regarding the scope and nature of federal income taxation. (Defendants' Opposition Brief, p. 36). Thus, it cannot be an abusive tax shelter captured within the snares of Section 6700. I disagree.

Clearly, in light of the Seventh Circuit's decision in **Kaun** the "De- Taxing America Program" is an abusive tax shelter. In **Kaun**, the defendant was the unofficial leader of a tax protester group known as the Wisconsin Society for Educated Citizens ("WSEC"). The WSEC held weekly meetings, with a usual attendance of 60 to 75 people. The most popular topic of discussion among the regular WSEC membership was the corruption of the internal revenue system, and the ways in which taxpayers could obstruct the workings of the Internal Revenue Service. For example, Kaun encouraged WSEC members to send as many Freedom of Information Act requests as possible, in order to "bog down" the IRS. Kaun also discussed requesting injunctions against employers to

prevent then from requiring their employees to fill out W-4 forms. The WSEC also sponsored a videotape presentation on the subject of filing common law liens against IRS personnel. Indeed, among the main evidence against Kaun were forms printed on the WSEC word processor, as well as various pamphlets and information kits that were offered at each meeting. These information kits included among their contents numerous form letters, sample certificates, and suggested pleadings designed to be used, among other things, for initiating Privacy Act and Freedom of Information Act requests, petitioning for termination of social security numbers, requesting tax refunds, terminating wage and salary withholdings, and seeking tax information from the Internal Revenue Service. Notably, the district court in its decision observed that "[a]mong the numerous misleading, if not simply fraudulent, representations advanced in these materials are that wages are not income, that filing a federal income tax return is purely voluntary and not required by law, that individuals can lawfully revoke their social security numbers,...and that individuals may claim complete exemption from income taxation on the ground that withholding is voluntary." **United States v. Kaun**, 633 F.Supp. 406, 416 (E. D.Wis.1986).

For the defendants to argue, in the face of **Kaun**, that the "De-Taxing America Program" is not an "abusive tax shelter" is ludicrous. Of course it is an "abusive tax shelter". The "Program" consisted of three volumes. Volume I of the Program instructs (indeed, at the very top of the second page of Volume I, large tab 3, is found the word "**INSTRUCTIONS**") the purchaser to send pre-printed and personalized "documents" to various officials of the United States Government, including: (1) the Attorney General of the United States; (2) officers and employees of the Internal Revenue Service; and (3) the

Director of Central Operations for the Social Security Administration. The stated purpose of Document 1 (as set forth in the accompanying "instructions") is "to determine whether or not the Internal Revenue Service considers you to be a taxpayer." Addressed to the Attorney General, Document 1 itself requests that the purchaser of the "De-Taxing America Program" package be provided with information that includes "[a] copy of the foundation instrument, signed by the agent of the Internal Revenue Service, which was used as the sworn affidavit of probable cause to identify us as citizens of the United States subject to the jurisdiction of United States Corporate Government" and "[a] copy of the instrument under Title 26, section 6331 which shows that we are the officers, employees, or elected officials whose wages and/or salaries could be levied without a court order..."

Document 2 of the Program, also addressed to the Attorney General, states that "we suspect that there is no such law" making the purchaser of the Program liable to file an individual income tax return. This "document" goes on to state that:

> Therefore, if you or whoever answers this letter do not furnish us with the law we are requesting within thirty days of receiving this letter, we are going to assume that there is no such law and use the return receipt to create a record of our inquiry in the event that we ever need to defend ourselves.
>
> As part of our research we have learned that the IRS Code is merely Prima Facie law. We have also learned that the 16th Amendment taxes income and that what we earn from our labor is not income. So we would ask that you do not quote these.

Similar false and erroneous statements are contained in subsequent letters addressed to Internal Revenue Service and Social Security Administration officials. For example, document 3 of the Program materials, which is addressed to the Director of Foreign Operations District of the Internal Revenue Service, states, in pertinent part, that:

> If you will not or do not provide us with the law which makes us liable to file an individual income tax return within 30 days of receiving this letter, you may rest assured that we will be applying for full refund of all of the taxes we have ever paid to the federal United States Government. Failure to respond to our request in 30 days will also lead us to conclude that there is no such law and to use the return receipt to create a record of our inquiry in the event that we ever need to defend ourselves.

Other "documents" contained in the Program instruct the purchasers to represent that they are "non-resident aliens" and therefore exempted from the requirement to file tax returns (Document 7); that they are not "taxpayers" who are required to a file tax return (Document 8); and that they are "sovereigns" who are not required to file tax returns or pay federal taxes (Document 9, entitled "Constructive Notice, Demand, and Statement"). Document 15 of the Program, entitled "Demand for MFR-01 Status (1040 Not Required)," is addressed to and informs the District Director of Internal Revenue that the purchaser has "canceled my election to file and pay federal income taxes." The "Special Legal Administrative Evidentiary Instrument" contained in the Program materials (as Document 20) represents that the "Instrument" is "prima facie evidence that the Declarants are not

required nor do they have any legal or lawful duty to file and/or make a Form 1040-U.S. Individual Income Tax Return..."

Purchasers of the Program are instructed to send Document 9, entitled "Constructive Notice, Demand and Statement," to the District Director of Internal Revenue to notify the Internal Revenue Service that they are no longer required to file federal income tax returns or pay federal income taxes. This "Constructive Notice, Demand and Statement" advises the Internal Revenue Service of the purchaser's "status as sovereigns under the U.S. Constitution (see 2:1:5), that is, 'non-taxpayers' under the law..." Document 9 proceeds to emphasize that "Evidently there are no published orders from the Secretary of the Treasury giving the Commissioner of Internal Revenue the requisite authority to enforce Title 26, the Internal Revenue Code, within the 50 states of the Union."

It is abundantly clear that the aforedescribed statements are false and baseless. Statements like them have been repeatedly rejected by the courts. **See Peth v. Breitzmann**, 611 F.Supp. 50 (E.D.Wis.1985) (collecting and rejecting various tax protester-type arguments regarding the validity of the internal revenue laws). That Congress has authority only over the District of Columbia and the federal possessions and territories and that therefore it may not tax citizens of the 50 states is an assertion that is nothing short of frivolous. **See United States v. Nelson (In re Becraft)**, 885 F.2d 547, 548 n. 2 (9th Cir.1989); **Coleman v. Commissioner**, 791 F.2d 68, 70 (7th Cir.1986) (argument that 'private citizens' are exempt from taxation is a tired one); **United States v. Hilgeford**, 7 F.3d 1340, 1342 (7th Cir.1993) (rejecting as "simply wrong" the claim that, as a citizen of the "Indiana State Republic," a taxpayer was outside the jurisdiction of United States); **United States v. Sloan**, 939 F.2d 499,

501 (7th Cir.1991) ("Mr. Sloan's proposition that he is not subject to the jurisdiction of United States [because he is a free born, natural citizen of Indiana] is simply wrong"); **United States v. Jagim**, 978 F.2d 1032, 1036 (8th Cir.1992) (taxpayer's contention that he is not subject to federal tax laws because he is a citizen of the sovereign state of Idaho is "patently frivolous"). Also incorrect, indeed frivolous, are any assertions in the Program documents that the only wages which may be taxed are those paid by the United States in its capacity as employer. **Lovell v. United States**, 755 F.2d 517, 519 (7th Cir.1984); **Granzow v. Commissioner**, 739 F.2d 265, 267 & n. 1 (7th Cir.1984).

Moreover, the above-described false statements found in the Program are material. A matter is considered material "if it would have a substantial impact on the decision-making process of a reasonably prudent investor." S.Rep. No. 97-494, 97th Cong.2d Sess. at 267 (1982 U.S.Code Cong. & Ad. News 781, 1014). The false representations contained in the Program are "material" because "[t]he taxpayers who have been or are now being audited by the IRS or are involved in litigation because they relied upon [the representations as set forth in the De-Taxing America Program] should certainly have been informed about their complete lack of merit". **United States v. White**, 769 F.2d 511, 515 (8th Cir.1985). More specifically, those purchasers of the Program who, for example, submitted Forms W-4 to their employers which falsely claimed that the purchasers were exempt from the requirements to withhold federal income taxes from their wages or salaries (and who ultimately had penalties assessed against them for such actions) should certainly have been told that the Program's instructions on how they should do so were baseless and bound to cause them to be subjected to such penalties.

The bottom line is that, just as what the defendant was "hawking" in Kaun was an abusive tax shelter and therefore ran afoul of Section 6700 of the Internal Revenue Code, 26 U.S.C. § 6700, so too, the "De-Taxing America Program" is an abusive tax shelter. Whether the defendants' involvement in the distribution of the Program is sufficient to warrant a finding, at this stage of the proceedings, that they violated Section 6700 of the Internal Revenue Code, and therefore may properly have an injunction entered against them pursuant to 26 U.S.C. § 7408, is the next question to be addressed.

E. THE DEFENDANTS' INVOLVEMENT IN THE DISTRIBUTION OF THE "DE-TAXING AMERICA PROGRAM" SUBJECTS THEM TO THE PROVISIONS OF SECTION 6700.

The defendants argue that the "plaintiff can point to no testimony from the 24 alleged purchasers of the ["De-Taxing America Program"] it deposed that defendants made any statements whatsoever regarding any alleged tax benefit from purchasing the [Program] information...In fact, defendants made no such statements...In the face of this simple and unambiguous fact, plaintiff disingenuously asserts that it is the [De-Taxing America Program] itself that constitutes the statutorily-required false statements...This desperate assertion is wholly unsupported by the case law, and does significant violence to plain language principles and common sense. Therefore, because a reasonable factfinder could find on this record that defendants made no external false statements regarding any alleged tax benefit of purchasing the [Program], this disputed material fact precludes summary judgment."

The defendants are wrong. First of all, in order for one to be held liable for his actions under Section 6700, all that is required is that he assist in the organization of any plan or arrangement, or participate directly or indirectly in the sale of any interest in an entity, plan or arrangement, and make or furnish "a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of... participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter."

The undisputed material facts clearly demonstrate that the defendants participated directly in the sale of the Program. Indeed, in their most recent declarations (which, at the defendants' request, were not stricken), they have admitted that they sold the Program to 32 individuals. And, as noted by the plaintiff in its reply brief, these evidentiary admissions are corroborated by the testimony of the purchasers of the Program whose depositions appear under the Sixth through the Twenty-Fifth Declarations of Teresa Dondingler Trissell, and the documentary evidence of record adduced in support of plaintiff's motion for summary judgment.

The foregoing materials demonstrate that Raymond and Bernhoft, doing business as "Morningstar Consultants", advertised in an Ozaukee County newspaper that "[t]he Internal Revenue Service has no Statutory Authority to: Compel you to File a Tax Return, Require withholding from your paycheck, Levy or Lien your property [and/or] Audit your Books & Records." Purchasers of the Program paid between $445 and $2,600 for their copies of the Program, usually by checks made out to the "Bounty Trust" at the direction of Raymond, who frequently collected the checks on behalf of Morningstar Consultants. A number of documents (as well as the

purchasers of the Program) identified Raymond and Bernhoft as being associated with Morningstar Consultants, and the records obtained by the Internal Revenue Service through the service of an administrative summons on the Ozaukee Bank show that Raymond and Bernhoft were, respectively, the "managing director" and a trustee of the Bounty Trust.

But, the defendants argue that the plaintiff has failed to show that either or both of them made any statements whatsoever, external to the Program itself, regarding any alleged tax benefit from purchasing the Program. Such being the case, the defendants argue that the plaintiff has failed to meet its burden of proof. I disagree.

As stated previously, certain "statements" in the Program were false. And these false statements related to "the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of... participating in the plan or arrangement..." 26 U.S.C. § 6700(a)(2)(A). For instance, the Program's representations that wages are not income, and that there is no legal obligation to file income tax returns or pay federal income taxes are material false statements that clearly come within the broad scope of Section 6700(a)(2)(A). Even assuming, arguendo, that the defendants made no statements "external" to the Program, such would not insulate them from the provisions of Section 6700. This is because the explicit language of that section makes subject to penalty any person who "makes or **furnishes** or causes another person to make or **furnish** (in connection with such organization or sale)" the prohibited statements. And, at a minimum, what the defendants here did was furnish false statements to the purchasers of the Program by the very act of selling them the Program.

Finally, I am persuaded that the defendants knew or had reason to know that the afore-described statements were false or fraudulent as to a material matter. To begin with, both of the defendants are intelligent individuals. Indeed, Bernhoft is a third-year law student at the University of Wisconsin Law School. To be sure, he may not have been a law student at the time he was selling of the Program. That he is currently that far in his legal education, however, speaks volumes regarding his intelligence and his degree of literacy. And Raymond is no intellectual slouch either. According to his declarations (which are all extremely well crafted), he is in the roofing business and has been engaged in that business for the last 19 years. He has also run for public office (although unsuccessfully). In the Fall of 1998 he ran for U.S. Senate on the U.S. Taxpayers Party ticket. He also serves on that political party's Platform Committee at the national and state level, and represented the U.S. Taxpayers Party of Wisconsin at the Seattle national convention in March, 1999. In sum, each of these defendants knew, or should have known, that the Program they were selling contained false statements, the nature of which are described above. At a minimum, each of them knew or should have known, that in **Kaun** the Seventh Circuit Court of Appeals had found to be false virtually the same sorts of statements as the defendants here furnished to the purchasers of the "De-Taxing America Program".

In conclusion, I am persuaded that the defendants, and each of them, engaged in conduct subject to penalty under Section 6700 of the Internal Revenue Code. Thus, an injunction pursuant to the provisions of Section 7408 of the Code, 26 U.S.C. § 7408, is to be entered if "injunctive relief is appropriate to prevent recurrence of such conduct."

F. THE ENTRY OF AN INJUNCTION UNDER SECTION 7408 OF THE INTERNAL REVENUE CODE IS APPROPRIATE TO PREVENT RECURRENCE OF THE DEFENDANTS' CONDUCT

When a defendant is found to have engaged in conduct subject to penalty under Section 6700, injunctive relief is available under Section 7408(a) if such relief "is appropriate to prevent recurrence of such conduct." In making this determination, the traditional equity requirements need not be met. **United States v. White**, 769 F.2d at 515; **United States v. Buttorff**, 761 F.2d at 1059 ("When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose.") In providing a specific injunctive remedy under Section 7408 for conduct violating Section 6700, Congress has already taken the traditional equity factors into consideration. **See United States v. Buttorff**, 563 F.Supp. 450, 455 (N.D.Tex.1983).

In **Kaun** the Seventh Circuit looked to the analogous area of securities law to identify a number of factors pertinent to determining whether the granting of injunction under Section 7408 is appropriate. Relevant factors include:

> [T]he gravity of the harm caused by the offense; the extent of the defendant's participation and his degree of scienter; the isolated or recurrent nature of his infraction and the likelihood that the defendant's customary business activities might again involve him in such transaction; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations.

United States v. Kaun, 827 F.2d at 1149.

In an effort to avoid the entry of an injunction against them, the defendants each presented declarations in which they state, among other things, that they will not sell the materials referred to in the pleadings, filings, and records of this case as the "De-Taxing America Program", at any time in the future. Nor will they sell any materials substantially similar to the materials referred to in the pleadings, files and records of this case as the "De-Taxing America Program", however denominated, at any time in the future. (Fourth Declaration of Raymond, paragraphs 8 and 9; Third Declaration of Bernhoft, paragraphs 8 and 9). The defendants may be most sincere when they express their future intentions. But, even assuming they are sincere, that does not mean that the court should refrain from entering an injunction.

The fact remains that the United States, as a result of the defendants' sales of the Program, has suffered a loss of tax revenues as a result of the failure of several purchasers of the Program to file federal income tax returns for the 1995, 1996 and/or 1997 taxable years. (Proposed Findings of Fact, No. 38). Based upon the income reported by some of these individuals on the income tax returns which they had previously filed with the Internal Revenue Service, as well as income actually received by some of these individuals (as reported to the Internal Revenue Service) and Bureau of Labor statistics, it is estimated that the United States has suffered a loss of federal income tax revenue in the amount of $691,731.00 as a result of the failure of some of those purchasers to file federal income tax returns. (Proposed Findings of Fact, No. 39). To be sure, the defendants question the accuracy of the amount of lost revenue, observing that the plaintiff previously asserted that United States lost over $1.5 million as a result of the defendants' conduct. Regardless of which figure is

accurate, there has nevertheless been a substantial loss of tax revenue as a result of the defendants' conduct.

Moreover, the defendants' conduct has contributed to the need for the United States, through the Internal Revenue Service, to incur considerable administrative expense in undertaking taxpayer delinquency investigations by attempting to contact the delinquent taxpayers and secure the unfiled federal income tax returns. Indeed, it has also caused the United States to incur administrative expense in dealing with inappropriately filed amended federal income tax returns which request refunds of all or a portion of the federal income taxes paid by the taxpayer for certain taxable years. For example, on February 12, 1996, a Treasury check in the amount of $2,138.60 was issued to Mr. and Mrs. Deiss, representing the requested 1992 tax refund of $1,744 plus statutory interest. When the Internal Revenue Service subsequently notified Mr. and Mrs. Deiss that the refund of $2,138.60 for his 1992 federal income tax liability was erroneous, Mr. Deiss wrote "Acceptance Refused for Cause Without Dishonor" "UCC 3-501" across the notice of erroneous refund on May 29, 1996, and returned it to the Internal Revenue Service.

In the end, the defendants' conduct has contributed to the need for the United States, through the Internal Revenue Service and its employees, to expend hundreds of man-hours in performing such functions as:

> (a) auditing the federal income tax liability of purchasers of the De-Taxing America Program;
>
> (b) preparing substitutes for return (SFRs) for purchasers of the De-Taxing America Program who failed to file income tax returns with the Internal

> Revenue Service for the 1995-1997 taxable years;
> (c) preparing, reviewing and issuing statutory notices of deficiency to purchasers of the De-Taxing America Program;
> (d) responding to Forms W-4 the filed by purchasers of the De-Taxing America Program who claimed that they were exempt from the federal withholding requirements, including proposing and assessing Section 6682 civil penalties;
> (e) responding to Freedom of Information Act (FOIA) and Privacy Act requests sent to the Internal Revenue Service by purchasers of the De-Taxing America Program;
> (f) issuing pre-filing notification and warning letters to purchasers of the De-Taxing America Program; and
> (g) collecting delinquent federal income taxes and statutory additions to tax from purchasers of the De-Taxing America Program.

(Proposed Findings of Fact, No.56)

Just as significantly, neither of the defendants has expressed in their respective declarations any acknowledgment that the steps they took in selling the Program ran afoul of any law, which for reasons previously stated, it did. Instead, they state:

> I stopped selling the information referred to in the pleadings, filings, and records of this case as the "De-Taxing America Program" over a year prior to filing of this action, well before I became aware that the Internal Revenue Service was investigating me, both criminally and

> civilly. My primary purpose in selling the materials was educative respecting things political and religious which I believed, and still believe, to be true. In particular, I intended that selling the information de-nominated the "De-Taxing America program" would further a spiritual and political awakening, such that political and legal reformation of corrupt political institutions could begin. I observed, however, after selling the information to approximately 32 people, that this goal would not the best served by further sales of the information, but by more concentrated and vigorous political and legal organizing and activism.

(Fourth Declaration of Raymond, paragraph 14; Third Declaration of Bernhoft, paragraph 14)

There is nothing in the defendants' respective declarations that gives the court any confidence that these defendants will not change their mind in the future and decide that, contrary to their earlier belief, their laudable goal of reforming corrupt political institutions could be best served by further sales of the "De-Taxing America Program". Simply stated, the defendants' admitted conduct, despite their professed lofty motive, has been profoundly disruptive to the functioning of the Internal Revenue Service and there is no reason to believe that they would not engage in such conduct again if they felt it would serve their purpose. In the exercise of its sound discretion, this court unhesitatingly opines that an injunction is appropriate in this case to prevent the recurrence by the defendants of conduct which the record shows them to have committed with respect to their promoting and selling the "De-Taxing America Program".

V. CONCLUSION

In conclusion, and for all of the foregoing reasons, I **RECOMMEND** that the Plaintiff's motion for summary judgment be **GRANTED**; I further **RECOMMEND** that the plaintiff's petition for permanent injunctive relief against the defendants be **GRANTED** and that the district judge execute the "Plaintiff's Proposed Form of Injunction" which has been filed with the court.

NOW THEREFORE IT IS ORDERED that the plaintiffs' motion to strike the select portions of defendants' declarations be and hereby is **DENIED**;

IT IS FURTHER ORDERED that plaintiffs' motion for leave to exceed the page limitation of Local Rule 6.01(c) nunc pro tunc be and hereby is **GRANTED**;

IT IS FURTHER ORDERED that defendants' motion to strike plaintiffs' reply brief be and hereby is **DENIED**;

IT IS RECOMMENDED that plaintiffs' motion for summary judgment be GRANTED;

IT IS FURTHER RECOMMENDED that plaintiffs' petition for permanent injunctive relief against the defendants be **GRANTED** and that the district judge execute the "Plaintiff's Proposed Form of Injunction" which has been filed with the court.

Any objection to this Order and Recommendation must be filed with the Clerk of Court, in duplicate, within ten days of service of the same. **See** 28 U.S.C. § 636(b)(1)(A), (B) and (C) and Local Rule 13 (E.D.Wis.). Failure to file a timely objection shall result in a waiver of your right to appeal all factual and legal issues.

SO ORDERED this 17th day of June, 1999, at Milwaukee, Wisconsin.

/s/ WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[Entered 9/20/1999]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil
Robert R. Raymond, individually and d/b/a Morningstar Consultants and Robert G. Bernhoft, individually and d/b/a Morningstar Consultants,	)	Action No. 97-C-207
	)	
	)	
	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF THE DISTRICT COURT'S ORDER OF JULY 27. 1999, AND REQUEST FOR A SECOND ENLARGEMENT OF TIME TO APPEAL THE MAGISTRATE'S ORDER OR PERMISSION TO FILE THE APPEAL NUNC PRO TUNC (DOC. #356) AND GRANTING PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S REPLY BRIEF IN SUPPORT OF RULE 59 MOTION TO ALTER OR AMEND JUDGMENT AND ACCOMPANYING DECLARATIONS (DOC. #362)

District Court Order Denying
Rule 59 Motion to Alter or Amend Judgment – 9/20/99

Before the court is the Defendants' Motion for Reconsideration of the District Court's Order of July 27, 1999 and Request for a Second Enlargement of Time to Appeal the Magistrate's Order or Permission to File the Appeal Nunc Pro Tunc (Doc. #356). Also before the court is the Plaintiff's Motion to Strike Portions of Defendant's Reply Brief in Support of Rule 59 Motion to Alter or Amend Judgment and Accompanying Declarations (Doc. #362). For the reasons set forth herein, the defendants' motions will be denied and the plaintiff's motion to strike will be granted.

On June 17, 1999, Magistrate Judge William Callahan issued a recommendation that this court grant plaintiff's motions for summary judgment and for permanent injunctive relief against the defendants. The last paragraph of the recommendation stated, "Any objection to this Order and Recommendation must be filed with the Clerk of Court, in duplicate, within ten days of service of the same. See 28 U.S.C. § 636 (b)(1)(A), (B) and (C) and Local Rule 13 (E.D. Wis.). Failure to file a timely objection shall result in a waiver of your right to appeal all factual and legal issues." (Emphasis Added). This court subsequently extended the time for the defendant to either object to or appeal the recommendation until July 26, 1999.

After the defendants failed to timely object to or appeal the recommendation, this court adopted the magistrate judge's recommendation by an order entered July 27, 1999. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Am 474 U.S. 140, 155, 106 5. Ct. 466, 472-73 (1985) (district court not required to review a magistrate judge's factual or legal conclusions when neither party objects to those findings).

The next day, July 28, 1999, the defendants filed an Appeal of and Objection to the Magistrate Judge's Order and Recommendation of June 17, 1999. They also filed a Motion for Reconsideration of the District Court's Order of July 27, 1999, and Request for a Second Enlargement of Time to Appeal the Magistrate's Order or Permission to File the Appeal Nunc Pro Tunc.The defendants asked that this court rescind its July 27, 1 999, order and either enlarge the time for them to file an appeal or to retroactively authorize their appeal to be filed. The plaintiff objects.

The defendant's motion for reconsideration will be denied. There is no question that the defendants' objection to and appeal of Magistrate Judge Callahan's recommendation was untimely. See 28 U.S.C. § 636; Local Rule 13.03(c). Although this court's June 23, 1999, order granted the defendants an extension of time until July 26, 1999, to file objections to the recommendation, objections were not filed until July 28, 1 999. Consequently,
the defendants are only entitled to consideration of their objections if they can establish that their tardy filing was the result of excusable neglect.

The Supreme Court elaborated on the standard for "excusable neglect" in Pioneer Investment Services Comoanv v. Brunswick Associates Limited Partnership. 507 U.S. 380 (1993), concluding that "neglect" can include omissions through carelessness and mistake. In considering what is excusable," courts are directed to examine all relevant circumstances, including the danger of prejudice to the [defendant], the length of the delay and its potential impact on judicial proceedings, the reasons for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Id. at 395. This determination is at bottom an equitable

one, taking into account all the relevant circumstances surrounding the party's omission.

The defendants have not shown that their failure to timely file their objections was due to excusable neglect. Although the defendants are proceeding pro Se, they are not unsophisticated litigants. They have vigorously defended themselves in this lengthy and complex litigation. The court notes that defendant Bernhoft is in his third year of law school at the University of Wisconsin. See Recommendation, p. 52. Furthermore, the defendants have never before missed a filing deadline during the course of this litigation. In fact, the defendants have routinely filed extensions of time to object to recommendations, always filing any objection by the date ordered or filing another motion for extension of time before the authorized time expired.

The defendants argue that their objections were late due to a misinterpretation of the law. The defendants state that they mailed their objections to the Clerk on July 26, 1 999, knowing that those objections would not be received until after the deadline had passed. However, they assert that they possessed a good faith belief that mailing the documents on the date due was sufficient. Both the law and their previous actions in this case contradict this argument. Excusable neglect does not require the court to relieve the parties from a unilateral mistake of law. Webb v. James, 147 F.3d 617, 622 (7th Cir. 1998). See also Members v. Paige, 140 F.3d 699, 702 (7th Cir. 1 998) (the fact that defendants appear pro se does not relieve them from compliance with court-imposed deadlines).

Because the defendants have not established that their objections were late as a result of excusable neglect, the court may not extend the time for them to file objections to the magistrate judge's recommendation. See Fed.R.Civ. P. 5(b).

The court cannot permit defendants' appeal to be filed nunc pro tunc July 26, 1999.

> As a general rule, district courts may issue *nunc pro tunc* orders "to show what was actually done but not properly or adequately recorded." (citations omitted) Thus, a *nunc pro tunc* order is typically used to correct clerical or ministerial errors or a failure of the court to reduce to judgment what it stated orally or in an opinion. (citations omitted). As a general rule, however, the district court may not make substantive changes affecting parties' rights *nunc pro tunc*. As [the Seventh Circuit] stated in King v. Ionization International, Inc., 825 F.2d 1180, 1188 (7th Cir.1987), "[the office of a *nunc pro tunc* ('now for then') order is to clean up the records by showing what was previously done with effect from the time done; it is not to alter substantive rights. Transamerica Ins. Co. v. South, 975 F2d 321, 325 (7th Cir. 1992).

Because an order from this court permitting defendants' appeal to be filed nunc pro tunc to July 26, 1999, would undisputably alter the substantive rights of the litigants, the requested relief will be denied.

The defendants have provided no other basis for this court to rescind its order of July 27, 1999. Consequently, this court finds that the defendants waived their right to

de novo review of magistrate judge Callahan's recommendation.

As for the United States' motion to strike, this court concludes that it must be granted. The defendants argue for the first time in their reply brief that newly discovered evidence justifies vacating this court's judgment dismissing the case. Specifically, the defendants contend that, in response to a Freedom of Information Act request, they received documents from the IRS national office in Washington, D.C. dated July 15, 1999, establishing that Assistant District Counsel Edward Langer was not a proper delegate of the Secretary of Treasury. Several affidavits were submitted by the defendants in support of this contention.

As the United States correctly points out, it is inappropriate for the defendants to present "newly discovered evidence" in their reply brief because the United States does not have an opportunity to respond. New arguments cannot be made for the first time in a reply brief. See Gold v. Wolcert, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989). Furthermore, the defendants have not explained why this information was not included at the time their motion for reconsideration was filed. The documents from the IRS national office were dated July 1 5, 1 999, and the motion for reconsideration was not filed until July 28, 1999. Therefore, in the absence of contrary evidence, the court presumes that the documents were in the defendants' possession prior to filing their reconsideration motion.

Finally, the court notes that even if it had conducted a de novo review of the defendants' appeal and objections, the magistrate judge's recommendation would be affirmed and the objections denied. There is no basis for overturn-

ing the decision that the plaintiff's motion to exceed the page limitation should be granted and the defendants' motion to strike plaintiff's reply brief be denied. Furthermore, the defendants have failed to establish that genuine issues of material fact exist precluding summary judgment. Judge Callahan's conclusion that the De-Taxing America Program is an abusive tax shelter is not erroneous, United States v. Kaun, 827 F.2d 1144 (7th Cir. 1987); neither is his conclusion that injunctive relief is appropriate.

Now, therefore,

IT IS ORDERED that Defendants' Motion for Reconsideration of the District Court's Order of July 27, 1999, and Request for a Second Enlargement of Time to Appeal the Magistrate's Order or Permission to File the Appeal Nunc Pro Tunc (Doc. #356) is denied.

IT IS FURTHER ORDERED that the Plaintiff's Motion to Strike Portions of Defendant's Reply Brief in Support of Rule 59 Motion to Alter or Amend Judgment and Accompanying Declarations (Doc. #362) is granted.

Dated at Milwaukee, Wisconsin this 20 th day of September, 1999.

BY THE COURT

/s/ C.N. CLEVERT, U.S. District Judge

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Entered December 6, 2000]

No. 99-4024

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT R. RAYMOND, individually and doing business as MORNINGSTAR CONSULTANTS, and ROBERT G. BERNHOFT, individually and doing business as MORNINGSTAR CONSULTANTS,

Defendants-Appellants.

Before

Hon. Joel M. Flaum, Chief Judge
Hon. Terence T. Evans, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above entitled case on November 13, 2000, by defendants-appellants, no

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby **DENIED**.

APPENDIX G

26 U.S.C. § 6700
Promoting abusive tax shelters, etc.

(a) Imposition of penalty. Any person who

(1)(A) organizes (or assists in the organization of)

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter, shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated.

(b) Rules relating to penalty for gross valuation overstatements.

(1) Gross valuation overstatement defined. For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or services if

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related to the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) Authority to waive. The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties. The penalty imposed by this section shall be in addition to any other penalty provided by law.

APPENDIX H

26 U.S.C. § 6701
Penalties for aiding and abetting understatement of tax liability

(a) Imposition of penalty. Any person

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person, shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty.

(1) In general. Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) Corporations. If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) Only 1 penalty per person per period. If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) Activities of subordinates.

(1) In general. For purposes of subsection (a), the term "procures" includes

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) Subordinate. For purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge. Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance. For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.

(1) In general. Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) Coordination with return preparer penalties. No penalty shall be assessed under subsection (a) or (b) of section 6694 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) Coordination with section 6700. No penalty shall be assessed under section 6700 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

APPENDIX I

26 U.S.C. § 7402
Jurisdiction of district courts

(a) To issue orders, processes, and judgments. The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees. Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

[(d) Repealed. Pub.L. 92-310, Title II, § 230(d), June 6, 1972, 86 Stat. 209]

(e) To quiet title. The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction. For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

APPENDIX J

26 U.S.C. § 7408
Action to enjoin promoters of abusive tax shelters, etc.

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability) may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in conduct subject to penalty under section 6700 or section 6701. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree. In any action under subsection (a), if the court finds

> **(1)** that the person has engaged in any conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability), and
>
> **(2)** that injunctive relief is appropriate to prevent recurrence of such conduct, the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under section 6700 or section 6701.

(c) Citizens and residents outside the United States. If any citizen or resident of the United States does not reside in, and does not have his principal place of business in, any United States judicial district, such citizen or resident shall be treated for purposes of this section as residing in the District of Columbia.

APPENDIX K

26 U.S.C. § 7701
Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof

* * * * *

(11) Secretary of the Treasury and Secretary.

(A) Secretary of the Treasury. The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary. The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate.

(A) In general. The term "or his delegate"

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

(3)

No. 00-1412

In the Supreme Court of the United States

ROBERT R. RAYMOND AND ROBERT G. BERNHOFT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction to enjoin petitioners from promoting and selling a tax-protest program that contained false and fraudulent statements regarding the federal income tax system.

2. Whether summary judgment was properly entered in this case when there were no material facts in dispute.

3. Whether an injunction prohibiting petitioners from selling tax-protest materials that contained false and fraudulent statements, from inciting others to violate federal tax laws, and from filing frivolous Freedom of Information Act (FOIA) requests with the government violated the First Amendment.

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In the Supreme Court of the United States

No. 00-1412

ROBERT R. RAYMOND AND ROBERT G. BERNHOFT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 228 F.3d 804. The opinion of the district court (Pet. App. 24-25), which adopts the report and recommendation of the magistrate judge (Pet. App. 29-91), is reported at 78 F. Supp. 2d 856.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2000. The petition for rehearing was denied on December 6, 2000 (Pet. App. 99). The petition for a writ of certiorari was filed on March 6, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1996, petitioners advertised and sold a tax-protest plan called "De-Taxing America." The plan contained materials promoting "general tax-protest principles" and set forth the view that the federal income tax is unconstitutional. Pet. App. 2. The materials included forms that guided purchasers through the "de-taxing" process. These forms led purchasers to believe that they no longer had to pay income or social security taxes and that they were entitled to receive refunds of all income taxes paid during the previous three years. *Id.* at 2-3.

After petitioners refused to cooperate with an investigation by the Internal Revenue Service into the "De-Taxing America" program, the Service requested the Department of Justice to file a suit to enjoin petitioners' actions. Pet. App. 4. Section 7408 of the Internal Revenue Code, 26 U.S.C. 7408, authorizes the Secretary of the Treasury to "request" the Attorney General to seek injunctive relief against the promoters of abusive tax shelters. The Code defines "abusive tax shelters" to include a "plan or arrangement" that makes false or fraudulent statements regarding tax deductions, credits or exclusions from income. 26 U.S.C. 6700(a)(1)(A)(iii). The request to the Department of Justice was made in a letter signed by an Assistant District Counsel of the Internal Revenue Service located in Milwaukee, Wisconsin. It was reviewed and approved by the National Office of the Chief Counsel located in Washington, D.C. Pet. App. 74. After receiving that request, the United States filed suit against petitioners to obtain a permanent injunction

against their continued promotion of the "De-Taxing America" scheme.

2. a. Petitioners filed two motions to dismiss the proceeding for lack of subject matter jurisdiction, both of which were denied by the district court. In response to the first motion, the government submitted (i) a redacted copy of the letter from the Assistant District Counsel to the Department of Justice requesting that the suit be filed, (ii) the declaration of the Assistant District Counsel verifying that he was a proper delegate of the Secretary for the purpose of submitting such a request and (iii) the declarations of two officials of the Department of Justice that explained that they had authorized the filing of the suit on behalf of the Attorney General. Pet. App. 8.

The government thereafter filed a motion for summary judgment. Petitioners opposed the motion, claiming that the district court lacked subject matter jurisdiction over the suit. Petitioners also denied that the tax-protest principles promoted in "De-Taxing America" were false. They stated that the program contained statements "which [they] believed, and still believe, to be true." Pet. App. 89. Finally, petitioners submitted declarations stating that they had stopped selling the "De-Taxing America" program and had no intention of selling that program in the future.

b. The district court concluded that the "De-Taxing America" program contained false statements and false advice concerning the federal income tax and therefore granted the government's motion for summary judgment. The court entered an injunction that bars petitioners from (i) selling and marketing the "De-Taxing America" program, (ii) inciting others to violate the tax laws and (iii) filing frivolous Freedom of Information Act requests with the Internal Revenue

Service (IRS). Pet. App. 21-22. The court held that the suit had properly been requested by a delegate of the Secretary, for "[t]he Declaration of Edward G. Langer establishes that the Chief Counsel of the IRS (through his delegate, Assistant Counsel Attorney Langer) authorized and requested the Attorney General" to file the suit. *Id.* at 74.

3. The court of appeals affirmed. Pet. App. 1-23. The court agreed with the district court that the declaration of the Assistant District counsel and the agency's letter requesting the suit established that this action had been properly authorized by the Secretary. *Id.* at 8. The court noted that petitioners "had ample opportunity to produce evidence that contradicts this declaration and have not done so." *Ibid.*

The court further concluded that the jurisdiction of the district court was not, in any event, dependent on the procedures established in Section 7408(a), which specifies that a suit for an injunction may be prosecuted "at the request of the Secretary." 26 U.S.C. 7408(a). The court held that jurisdiction for this suit exists under Section 7402 of the Code, which authorizes the district courts "to make and issue in civil actions, writs and orders of injunction, * * * and such other orders and processes, and to render such judgements and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a).

The court of appeals also rejected petitioners' contention that there were disputed facts that precluded the entry of summary judgment. The court noted (i) that the statements made by petitioners "are clearly false representations concerning the government's authority to tax its citizens" and (ii) that the undisputed evidence reflects that petitioners "reasonably should

have known [that these statements] were false." Pet. App. 14, 15.

The court rejected petitioners' assertion that the injunction entered in this case violates their First Amendment rights. Construing the injunction "to prohibit only false, deceptive or misleading commercial speech that is related to the provision of tax advice," and noting that "[i]t is permissible for the government to prevent the dissemination of false or misleading commercial speech," the court held that the injunction should be sustained because it is "narrowly tailored to prohibit only those activities that can be restrained consistent with the First Amendment." Pet. App. 21, 22, 23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Section 7408 of the Internal Revenue Code authorizes an action by the United States to enjoin any person from "promoting abusive tax shelters" and specifies that such a suit may be "commenced at the request of the Secretary" of the Treasury. 26 U.S.C. 7408(a). The term "abusive tax shelter" encompasses any "plan or arrangement" for making false or fraudulent statements about "the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit * * * ." 26 U.S.C. 6700(a)(1)(B), (2)(A); see 26 U.S.C. 7408(a).

The court of appeals correctly concluded (Pet. App. 8) that the declarations submitted by the government officials in this case, and the redacted copy of the letter requesting that the suit be commenced, sufficiently

established that the suit was "requested" by the Secretary under this provision. Contrary to petitioners' erroneous submission (Pet. 10-16), courts have routinely relied on such declarations and on copies of the actual letters requesting suit to establish that suits have been properly authorized. See, *e.g.*, *Palmer* v. *United States Internal Revenue Service*, 116 F.3d 1309, 1311 (9th Cir. 1997); *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *United States* v. *Nuttall*, 713 F. Supp. 132, 136-137 (D. Del.), aff'd, 893 F.2d 1332 (3d Cir. 1989).[1] The factual determination that the evidence adduced in this case establishes that the suit had been requested by the Secretary was "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) and does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

b. The court of appeals also correctly noted that the jurisdiction of the district court to enjoin petitioners from promoting abusive tax shelters is not, in any event, dependent on a request by the Secretary under Section 7408. Pet. App. 6-7. Section 7408 does not itself confer subject matter jurisdiction on the district courts. Instead, Section 7408 specifies that district court jurisdiction for an action under that Section is "provided in

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[1] While "the mere allegation of facts necessary for jurisdiction" is not sufficient when those facts are challenged by the defendant (*United States* v. *One 1972 Cadillac Sedan, Coupe*, 355 F. Supp. 513, 515 (E.D. Ky. 1973)), in the present case the government did not rely solely on the allegations of its complaint. Instead, as the court of appeals emphasized, the government submitted sworn declarations and evidence in response to petitioners' motion to dismiss. Pet. App. 8. Petitioners "had ample opportunity to produce evidence that contradicts this declaration and have not done so." *Ibid.*

section 7402(a)." 26 U.S.C. 7408(a). In turn, Section 7402(a) broadly provides that "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction * * * as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a). The court of appeals correctly recognized (Pet. App. 6-7) that the express language of Section 7408 does not purport to provide a district court with jurisdiction to grant injunctive relief. Instead, that statute refers to and relies upon the broad, general jurisdiction established in Section 7402 over actions "necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a).

As the court of appeals observed, "Section 7402(a) explicitly grants district courts the authority to issue injunctions to enforce the tax laws and states that all remedies that are normally available to the United States to enforce its laws are not limited by that section." Pet. App. 7. In this context, the court correctly concluded that the provisions of Section 7408 that authorize injunctive relief against specific acts do not limit the jurisdiction of the courts under Section 7402 to issue remedies encompassed by the latter provision (Pet. App. 7):

> The specific provisions of [Section 7408], including the provision that the suit must be authorized by the Secretary of the Treasury or his delegate, are procedural and not jurisdictional. Therefore, even if we were to conclude that the United States had not received proper authorization from the Secretary of the Treasury, that fact would not affect the jurisdiction of the district court.

The court's holding that a "request" by the Secretary under Section 7408 is a procedural, rather than jurisdictional, requirement for an injunction suit thus comports with the plain language of these provisions. No other court has addressed this issue, and no plausible claim of a conflict among the circuits on this issue can thus be asserted.[2] In any event, because the record supports the determination of both courts below that a "request" was in fact made under Section 7408, this case presents no occasion for review of the court's alternative legal conclusion that Section 7408 is not jurisdictional in character.

2. An injunction may be entered against any person who promotes an abusive tax shelter when such "relief is appropriate to prevent recurrence of such conduct." 26 U.S.C. 7408(b). Courts have described several factors to be considered in determining whether such injunctive relief is appropriate, including (i) the gravity

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[2] Petitioners suggest (Pet. 8) that the holding in this case is contrary to the Seventh Circuit's own precedent in *United States* v. *One 1941 Cadillac Sedan*, 145 F.2d 296, 299 (1944), as well as decisions of the Sixth, Eighth and Ninth Circuits in *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981), *United States* v. *Twenty-Eight "Mighty Payloader" Coin-Operated Gaming Devices*, 623 F.2d 510, 513 n.2 (8th Cir. 1980), and *Palmer* v. *United States*, 116 F.3d 1309, 1311 (9th Cir. 1997). None of those decisions, however, interpreted the statute involved in this case. Instead, those cases interpreted Section 7401 (or its predecessor), a statute that concerns suits brought to collect taxes. Moreover, petitioners err in asserting that those prior decisions held that Section 7401 is jurisdictional. Neither the Seventh, Eighth, nor Ninth Circuit decisions contain any such holding. And, although the Sixth Circuit's opinion describes Section 7401 as "jurisdictional," that description lacked significance in that case because the court concluded that the government's suit had, in fact, been properly authorized. *United States* v. *Walters*, 638 F.2d at 950.

of the harm caused by the promoters, (ii) the extent and intent of their involvement in the scheme, (iii) the isolated or recurring nature of the activities, (iv) the extent of any recognition by the promoters of their own culpability, (v) the likelihood that the occupation of the promoters would place them in a position where future violations could be anticipated and (vi) the sincerity of any assurances given by the promoters against future violations. See *United States* v. *Estate Preservation Services*, 202 F.3d 1093, 1105 (9th Cir. 2000); *United States* v. *Kaun*, 827 F.2d 1144, 1145 (7th Cir. 1987); *United States* v. *Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985).

The courts below correctly concluded that an injunction was appropriate in this case notwithstanding the fact that petitioners submitted declarations stating that they had stopped selling the De-Taxing America program and had no intention of resuming such sales. There is no merit to petitioners' contention (Pet. 17-23) that these declarations created a factual dispute regarding their credibility that prevented the entry of summary judgment under this Court's decision in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court did not make any determination regarding petitioners' credibility in granting summary judgment for the United States. Instead, the district court assumed that the statements made in petitioners' declarations were sincere (Pet. App. 86). In view of the undisputed fact that petitioners refused to acknowledge "that the steps they took in selling the Program ran afoul of any law," however, the court concluded that "there is no reason to believe that they would not engage in such conduct again if they felt it would serve their purpose." *Id.* at 88, 89. The court therefore "unhesitatingly opine[d] that an injunction is

appropriate in this case to prevent the recurrence by the defendants of conduct which the record shows them to have committed." *Id.* at 89. The judgment entered in this case thus did not turn on, and did not require an examination of, the veracity of petitioners' declarations.[3]

3. The court of appeals correctly held that the injunction granted by the district court in this case did not violate petitioners' First Amendment rights. As the court emphasized, the injunction proscribes only activities that (i) incite others to violate the tax laws, (ii) market documents that provide false or fraudulent tax advice or (iii) involve the initiation of frivolous litigation. Pet. App. 21-22. As the court correctly concluded (*ibid.*), the injunction granted in this case is thus entirely consistent with the decisions of this Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), *Times Film Corp.* v. *City of*

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[3] Petitioners err in contending (Pet. 19-22) that the decision in this case conflicts in this regard with the decision of the Ninth Circuit in *Great Western Land & Development, Inc.* v. *SEC*, 355 F.2d 918 (1966). The *Great Western* case does not hold that summary judgment is inappropriate in an injunction case whenever a promoter submits a declaration stating that he has stopped selling a program and will not do so in the future. To the contrary, in concluding that the totality of "the circumstances" that existed in *Great Western* supported a need for further findings prior to the entry of injunctive relief, the court did not purport to establish a legal standard that governed beyond the particular facts in that case. See *id.* at 919.

Chicago, 365 U.S. 43 (1961), and *Near* v. *Minnesota*, 283 U.S. 697 (1931).

The injunction entered below is also consistent with the relief entered by other courts that have addressed abusive tax shelters under Section 7408 and have upheld injunctions against the "fraudulent conduct" of the promoters. *United States* v. *Estate Preservation Services*, 202 F.3d at 1106. See also *United States* v. *Kaun*, 827 F.2d at 1150-1152; *United States* v. *White*, 769 F.2d 511, 516-517 (8th Cir. 1985); *United States* v. *Buttorff*, 761 F.2d 1056, 1066 (5th Cir. 1985). Petitioners err in contending (Pet. 25-26) that the decision in this case conflicts with the decision of the Ninth Circuit in *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), cert. denied, 466 U.S. 980 (1984). In the *Dahlstrom* case, the court concluded that the record did not support a finding that the tax shelter promoted in that case "contemplated *imminent* lawless action." 713 F.2d at 1428. By contrast, the undisputed facts of the present case (Pet. App. 61-68) amply demonstrate that several "lawless actions" resulted from petitioners' tax-protest program. The Ninth Circuit has, moreover, agreed with the view expressed by the court of appeals in the present case that the First Amendment does not prohibit injunctions in proper cases against the unlawful conduct proscribed by Section 7408. See *United States* v. *Estate Preservation Services*, 202 F.3d at 1106. There is thus no conflict among the circuits to warrant further review in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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MAY 2001